No. 86-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ANGOON, *et al.*,
Petitioners,

v.

DONALD HODEL, SECRETARY OF THE INTERIOR, *et al.*, SHEE ATIKA, INC., and SEALASKA, CORP.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States has relinquished title to the navigational servitude within the three-mile limit of Alaska's coastal waters, so that it need not comply with the procedural protection provided subsistence resources in § 810(a) of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C.A. § 3120(a).

2. Whether the Ninth Circuit's holding that the prohibition against harvesting timber "within the Monument" in ANILCA § 503(d) does not apply to a private inholding located "within the *boundaries* of the Admiralty Island National Monument," conflicts with this Court's construction of the analogous geographic term "in Alaska" in ANILCA § 102 in *Amoco Production Co. v. Gambell,* No. 85-1239 (U.S. March 24, 1987).

3. Whether the Ninth Circuit erred in entering summary judgment *sua sponte* against Petitioners, without providing them an opportunity in either the district court or the court of appeals to conduct discovery or demonstrate that there were disputed issues of material fact, contrary to this Court's holding in *Fountain v. Filson,* 336 U.S. 681 (1949).

PARTIES TO THE PROCEEDINGS

Petitioners and plaintiffs-appellants below are: The City of Angoon, a traditional Tlingit Native village, located within the Admiralty Island National Monument and Wilderness in Southeast Alaska; the Angoon Community Association, the tribal government for the village; 287 individual residents of Angoon; and the Sierra Club and The Wilderness Society, both national conservation organizations.*

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* In an appeal to the Ninth Circuit of a preliminary injunction entered in this same case, *City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1985), the following parties appeared as amici in support of Petitioners:

National Indian Youth Council
Indian Law Resource Center
Menominee Indian Tribe of Wisconsin
Congressman Michael Lowry (D. Wash.)
National Audubon Society
Natural Resources Defense Council
Southeast Alaska Conservation Council
Legal Environmental Assistance Foundation

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

No.

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Petitioners City of Angoon, the Sierra Club, The Wilderness Society, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on October 31, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 803 F.2d 1016, and is reprinted in the Appendix ("App.") at A-1.

The three opinions of the District Court for Alaska (von der Heydt, J.) are unreported; the two relevant opinions are printed at App. D and E.

JURISDICTION

Petitioners brought suit in the district court alleging jurisdiction under 28 U.S.C. §§ 1331, 1361, and 1367. The district court granted partial summary judgment for Petitioners on one issue and for Respondents on other issues in a Memorandum and Order dated November 26, 1985. App. D-6. The district court granted summary judgment for Respondents on other issues in two Memoranda and Orders dated October 17, 1985. App. E. Partial Final Judgment was entered December 27, 1985. App. F.

Petitioners and Respondents filed cross-appeals, and the Court of Appeals reversed in part and affirmed in part in a *per curiam* opinion dated October 31, 1986. App. A. The judgment was entered the same date. App. B-1. A timely-filed petition for rehearing was denied December 1, 1986. App. C-1.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1). Justice O'Connor extended Petitioners' time for filing this Petition to and including April 10, 1987.

STATUTES INVOLVED

The Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (codified in various sections of 16 and 42 U.S.C.) (pertinent text set forth in App. G-1 to 5).

The Submerged Lands Act, 43 U.S.C.A. §§ 1301-1314 (pertinent text set forth in App. G-5 and 6).

The National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-4361 (pertinent text set forth in App. G-6 to 8).

Federal Rules of Civil Procedure, Rule 56, Summary Judgment (pertinent text set forth in App. G-9).

STATEMENT OF THE CASE

1. Summary

Petitioners City of Angoon and the Angoon Community Association represent the traditional subsistence interests of the 600 residents of the village, 287 of whom are individual Petitioners. The village is the only permanent settlement on Admiralty Island in Southeast Alaska. It also is the only remaining traditional Tlingit Indian village. Angoon's traditional use of Admiralty Island extends along the west coast of the island, from the bays south of Angoon, to Cube Cove, thirty miles to the north. Cube Cove, which is within the three-mile limit of Alaska's coastal waters, is one of Angoon's most important subsistence areas.[1] Its pristine waters are used for fishing and gathering, and its sheltered cove is used as an anchorage in storms. The Angoon Tlingit also traditionally use the uplands surrounding Cube Cove for subsistence hunting, gathering, and trapping.[2]

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[1] Federal Respondents' Environmental Impact Statement confirms the importance of Cube Cove:

> Angoon residents have hunted, gathered, fished and trapped along the western coast of Admiralty Island as far north as Hawk Inlet at least throughout the historic period .... Cube Cove was and is a location exploited by Angoon people ... when they are traveling up and down Chatham Strait. It appears to be important for deer hunting, both as a specific destination and as part of a beach hunting strategy wherein every cove on the coast north of Angoon is visited looking for deer. Deer meat is a highly valued and important part of the Angoon diet and hunters will go further to harvest deer than to harvest any other wild resources (George and Kookesh 1983:12).

Court of Appeals, Excerpt of Record at 00281.

[2] Because it is one of the last remaining isolated and intact ecosystems in North America, Admiralty Island also is an important scientific laboratory for the study of nesting bald eagles (the island has the densest population of nesting eagles in the world), giant Alaska brown bears (also among the densest populations in the world), and other wildlife. Similarly, because the island has been separated from the mainland since the last Ice Age, it is a unique "control" for the study of comparative evolution between areas affected by development and those in their natural state. *See generally,* Presidential Proclamation 4611, Admiralty Island National Monument, 14 Weekly Comp. Pres. Doc. 2112 (Dec. 1, 1978).

Cube Cove and the surrounding lands are within the boundaries of the Admiralty Island National Monument, established by Presidential Proclamation in 1978 and by Congress in 1980. ANILCA § 503(b), 94 Stat. 2399, App. G-2. Congress also conveyed a 23,000-acre inholding surrounding Cube Cove to Shee Atika, Inc., the urban Native corporation for the City of Sitka (located on Baranof Island). ANILCA § 506(c), 94 Stat. 2409, App. G-3. Shee Atika, Inc. plans to clearcut timber harvest 20,000 acres of its inholding within the Monument. "[B]ecause of the configuration of the Cube Cove lands, their harvest could affect the wilderness character of a large surrounding area of public land as well, perhaps as much as 80,000 additional acres." Memorandum and Order on Subsistence and Trust Responsibilities, October 17, 1985, App. E-2. Angoon's wildlife and anthropology experts testified that this would affect up to half of Angoon's traditional subsistence territory, and could lead to the destruction of the culture. Court of Appeals, Plaintiffs' Excerpts of Record, Vol. I at Tabs 20 to 24. More than 1,000 acres already have been harvested.

To support its timber operation, Shee Atika, Inc. plans to construct a 400-foot permanent rock-fill breakwater in the coastal waters of Cube Cove as part of its log transfer facility ("LTF"). In April, 1982 the Corps of Engineers issued permits for the breakwater and LTF under § 404 of the Clean Water Act, 33 U.S.C.A. § 1344, and § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C.A. § 403.

2. Procedural History

The City of Angoon, the Angoon Community Association, 287 individually-named Natives, the Sierra Club, and The Wilderness Society ("Angoon" or "Petitioners") challenged the issuance of the Corps' permits for the breakwater and LTF in the district court, claiming, *inter alia,* that the permits were improper because they had been issued without preparation of an Environmental Impact Statement ("EIS"), as required under the National Environmental Policy Act ("NEPA"), 42 U.S.C.A. § 4321 *et seq.* The Corps subsequently stipulated to suspend its earlier permits, and agreed to prepare an EIS.

In March, 1984 Angoon returned to court to enjoin construction of the LTF and related timber harvesting on 400 acres of Shee Atika's inholding.[3] The district court granted a temporary restraining order halting construction of the LTF, but did not enjoin the related harvesting. After expedited briefing and argument, in April, 1984 the district court granted a preliminary injunction against timber harvesting. The court held that the prohibition against timber harvesting "within the Monument" in ANILCA § 503(d) should be construed to prohibit harvesting on all lands "within the boundaries of the Monument," including Shee Atika's inholding. In December, 1984 the Ninth Circuit reversed the preliminary injunction. *Angoon v. Marsh,* 794 F.2d 1413 (9th Cir. 1984). The case was remanded to the district court where it was consolidated with three related actions and renamed *Angoon v. Hodel.*

Upon consolidation, the district court ordered Angoon to file a consolidated complaint. This was submitted on April 29, 1985 and included new claims under NEPA §§ 101 and 102 challenging both the adequacy of the EIS (which the Corps completed in October, 1984), and the validity of the Corps' decision to reinstate the permits (the Record of Decision was issued February 25, 1985).

Upon the filing of the consolidated complaint, Shee Atika and the Federal defendants moved for summary judgment on all claims. Angoon responded with cross-motions for summary judgment on the claims brought under ANILCA and the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C.A. § 1621(k). In addition, Angoon moved for *partial* summary judgment on their challenge to the adequacy of the EIS (in light of the Corps' failure to study the alternative of exchanging the inholding for other federal interests outside the Monument). This was only one of several claims under §§ 101 and 102 of NEPA; Angoon concluded that their other challenges to the adequacy of the EIS and the validity of the Corps'

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[3] Shee Atika had commenced operations despite the absence of a completed EIS and the suspension of the permits. The Corps eventually issued a Cease and Desist Order directing Shee Atika to halt its illegal activities.

permits were not appropriate for summary judgment, at least at that time.

In the one week between the Corps' issuance of its decision on the § 404 and § 10 permits and the district court's order to file a consolidated complaint, Angoon had no opportunity to conduct discovery on these claims. Following the district court's order to submit briefs within 30 days, Petitioners devoted their attention to briefing the ANILCA and ANCSA issues and their one non-factual NEPA issue. In light of these exigencies, counsel for Angoon submitted an affidavit pursuant to Rule 56(f), Federal Rules of Civil Procedure, noting, in addition to their need for discovery, that affidavits already submitted showed the existence of factual disputes regarding the environmental and subsistence effects of Shee Atika's LTF project, thus rendering Angoon's other, factually-based, challenges to the EIS and permits inappropriate for disposition by summary judgment.

In a series of three Memoranda and Orders, two issued October 17, 1985 and one issued November 26, 1985, the district court dismissed Angoon's ANILCA claims and their one ANCSA claim, and granted Angoon's cross-motion for summary judgment on the limited issue of the inadequacy of the EIS in light of the failure to study the alternative of a land exchange. (This made it unnecessary for the court to rule on Angoon's Rule 56(f) affidavit.) The district court denied defendants' motions for summary judgment on all NEPA issues. Cross-appeals were then taken.

On appeal, the Court of Appeals for the Ninth Circuit affirmed the dismissal of Angoon's ANILCA and ANCSA claims, holding, *inter alia,* that § 503(d)'s timber harvest prohibition does not apply to Shee Atika's private inholding within the boundaries of Admiralty Island National Monument. The court also held that the United States does not hold title to the navigational servitude, and that the Corps was not required to consider the subsistence effects of its decision to permit the LTF and breakwater to use the navigable waters of Cube Cove. The Court of Appeals reversed the district court's grant of

partial summary judgment to Angoon on the inadequacy of the EIS in light of the failure to study the alternative of a land exchange, holding that exchange of Shee Atika's inholding did not need to be studied in-depth.[4]

Instead of remanding, however, the Court of Appeals went on to hold that "the adequacy of an EIS is a legal question" and that there were no issues of material fact remaining. The court then *sua sponte* directed entry of summary judgment for defendants on the adequacy of the EIS and the validity of the Corps' permits.

Following the Court of Appeal's decision, Angoon petitioned for rehearing, drawing the court's attention to the fact that they were given no opportunity to present their remaining NEPA claims to the district court, that there were disputed issues of material fact with respect to these claims (as evidenced by the subsistence affidavits already in the record), that the district court had never ruled on their Rule 56(f) affidavit, and that summary judgment on their remaining claims, without notice or an opportunity to be heard, was inappropriate. Angoon asked the court to remand the case to the district court for trial. On December 1, 1986, the Ninth Circuit denied the motion without comment.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Relinquishes the United States' Title to the Navigational Servitude in the Coastal Waters of Alaska, So that the Waters Do Not Qualify for Subsistence Protection Under § 810 of ANILCA, and Is in Conflict with the Reasoning of this Court in *Gambell*, *United States v. California*, and *Cherokee Nation*

In the decision below the Court of Appeals boldly held that "the United States does not hold title to the navigational servitude," so that § 810 does not apply to federal actions

[4] Although Angoon asserts that this holding in incorrect, they are not seeking review on this issue.

permitting the use of Alaska's vast coastal waters.[5] While the issue of title does not appear ever to have been decided by this Court, the reasoning of the Court of Appeals appears to conflict with the reasoning of several Supreme Court decisions, including *Amoco Production Co. v. Gambell,* No. 85-1239 (U.S. March 24, 1987), *United States v. California,* 332 U.S. 19 (1947), and *United States v. Cherokee Nation of Okla.,* No. 85-1940 (U.S. March 31, 1987).[6]

In *Gambell,* the Court considered whether the United States held "title" to the Outer Continental Shelf, within the meaning of § 810. The Court responded cautiously that while the United States "may not hold 'title' to the submerged lands of the OCS, . . . we hesitate to conclude that the United States does not have 'title' to any 'interests therein.' " *Gambell,* slip op. at 16, n.15.

The holding of the Court of Appeals appears as well to conflict with the reasoning of *United States v. California* and with the congressional understanding embodied in the Submerged Lands Act, 43 U.S.C.A. § 1301 *et seq.,* both of which are premised on the assumption that the United States holds an interest in, and the power to dispose of, the coastal waters of the United States, including the navigational servitude.

The Court of Appeals decision also appears to conflict with the reasoning of *Cherokee Nation* and the many other Supreme Court decisions that distinguish between the broad constitutional power over navigable waters under the Commerce Clause, and the navigational servitude as a geographically defined property interest, and which strictly guard the United States' fullest rights in and powers over this interest.

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[5] Section 810 of ANILCA, 16 U.S.C.A. § 3120, App. G-4, imposes obligations on federal agencies with respect to decisions affecting the use of "public lands . . . in Alaska," which are defined to mean "lands, *waters, and interests therein,*" the "*title* to which is in the United States *after the date of enactment of* [*ANILCA*]." ANILCA § 102, 16 U.S.C.A. § 3102, App. G-1 (emphasis added).

[6] Section 810 applies only "in Alaska" and it is unlikely that any circuit other than the Ninth will consider this issue and create a more direct conflict.

A. Whether the United States Has Relinquished Title to the Navigational Servitude Is an Important Issue

Relinquishing title to the navigational servitude is an important undertaking. This Court has always strictly guarded the United States' full interest in the navigable servitude. If any part of that interest, including title, is now to be relinquished by the judiciary, it should be done cautiously, by this Court, and with a full understanding of all the possible consequences.

For § 810 alone, surrendering title means that the subsistence resources of Alaska's vast coastal and inland waters will receive no protection under the procedural safeguards of ANILCA. Many of Alaska's Natives and other subsistence users rely on the resources in the coastal waters, as well as the resources in inland waters.[7] (The Corps of Engineers records show over 6,000 permits to use Alaska's navigable waters, with another 200 permits now pending.)

Unless the United States has some "title" in the navigational servitude or other interest in the navigable waters of Alaska, to satisfy the definition of "public lands," these federal actions will continue to be undertaken without regard to possible effects on subsistence. For the villagers of Angoon this could be devastating. It also could be devastating for the many other subsistence users of Alaska's vast coastal area.

This Court should grant the writ to resolve the important issue of whether the United States has relinquished its title to Alaska's coastal waters for the purposes of ANILCA § 810.

B. The Holding and Reasoning of the Decision Below

In considering whether § 810 applied to the Corps of Engineers' decision to permit the use of the coastal waters of Cube Cove, adjacent to Shee Atika's inholding within the

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[7] Alaska's 6,640 miles of general coastline is 54% of the general coastline of the United States. McRoy & Goering, *Coastal Ecosystems of Alaska*, in 1 COASTAL ECOLOGICAL SYSTEMS OF THE UNITED STATES, (H.T. Odum, B.J. Copeland, E.A. McMahon ed. 1984) at 125; *see also id.* at 124 ("Alaska lives on its coast, a coast that extends from the rain forests of Southeast Alaska to the arctic tundra.").

Admiralty Island National Monument, the Court of Appeals observed that "[i]t seems likely that . . . a subsistence evaluation of the government's Cube Cove actions would be beneficial and consistent with the purposes of ANILCA." 803 F.2d at 1028, App. A-23. Nevertheless, the court held that "[s]ince the United States does not hold title to the navigational servitude, the servitude is not 'public land' within the meaning of ANILCA," and a subsistence evaluation therefore is not required under § 810. 803 F.2d, at 1027-28, n.6, App. A-22, n.6.[8]

The Court of Appeals reasoned that the servitude is no more than the " 'power of government to control and regulate navigable waters in the interest of commerce.' " *Id.*, quoting *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961) (which in turn was quoting *United States v. Commodore Park*, 324 U.S. 386, 390 (1945)). Beyond offering the quoted language, the Court of Appeals did not further discuss *Virginia Electric* or *Commodore Park*. Neither decision, however, holds that the United States does not have title to the navigational servitude. And while neither decision explicitly holds that the United States does have title, each analyzes the navigational servitude as *both* a geographically-defined property interest, dominant over all other interests, *and* as a vehicle for regulation under the Commerce Clause power.[9]

In *Virginia Electric* the Court referred to the "navigational servitude—sometimes referred to as a 'dominant servitude,' . . . or a 'superior navigation easement . . . ,' " 365 U.S. at 627, and reasoned that "[s]ince the . . . servitude only encompasses . . . the stream itself and the lands beneath and within its

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[8] In rejecting Angoon's alternative argument that the spillover effects on the adjacent Monument lands, caused by the clearcutting, constitute the use of "public lands," the court held that "none of the agencies Sierra cite has 'primary jurisdiction' over the public lands used for subsistence, as required by section 810." 803 F.2d at 1028, App. A-23. This comment, however, was not addressed to the navigable servitude, which is under the primary jurisdiction of the Corps of Engineers. *See infra* at 12.

[9] Both decisions also are distinguishable because they involve inland waters, in contrast to the coastal waters at issue here. *United States v. California*, 332 U.S. 19, 30 and n.9 (1947) specifically distinguishes *Commodore Park* on this ground. *See also, infra* at 12, n. 10.

high-water mark, the Government must compensate for any taking of fast lands . . ." outside this geographic boundary. *Id.* at 628. The Court also noted that the navigational servitude " 'can be asserted to the exclusion of any competing or conflicting' " property interest, for any such interest " 'has always been subject' " to the servitude. *Id.*

Similarly, *Commodore Park* observed that since the "[r]espondent's property was always subject to a dominant servitude . . . ," and his "fast lands [were] left uninvaded, [he] ha[d] no private riparian rights . . . , for which rights the government must pay." 324 U.S. at 391. Both *Virginia Electric* and *Commodore Park* refer to the servitude in this dual manner—as both a property interest and as a power over commerce.

Virginia Electric and *Commodore Park's* property analysis of the navigational servitude is consistent with the notion that the United States holds "title" to that "dominant servitude" or "superior navigation easement." But whether or not the United States holds the *technical legal* "title," it should be enough for § 810 that whatever title the United States does have, it was not conveyed to any other party by ANILCA, and therefore "the title . . . is in the United States *after the date of enactment of* [ANILCA]." ANILCA § 102(2) (emphasis added).

C. The Decision Below Conflicts with the Reasoning of *Gambell*

In holding that § 810 does not apply to the Outer Continental Shelf ("OCS"), outside the three-mile boundary limit, the *Gambell* Court reasoned that § 810 applies "in Alaska"; that "in Alaska" means "*within the boundaries of the State of Alaska*"; and that those boundaries extend "to a line three miles from its coastline." *Gambell,* slip op. at 13-14 (emphasis in original). Unlike the OCS, Cube Cove is on the coast of the Admiralty Island National Monument, and within the three-mile boundary of the state.

Gambell next considered the alternative argument that § 810 does not apply to the OCS because the United States does

not claim "title" to the submerged lands of the OCS. The Court rejected this, reasoning that:

> The United States may not hold "title" to the submerged lands of the OCS, but we hestiate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States."

Id. at 16, n.15. Whatever the nature of the United States' "interest" in the OCS, the United States holds title to an "interest" within the three-mile limit (including the waters of Cube Cove). That "interest" is the navigational servitude.

In addressing an alternative argument, the *Gambell* Court also observed that "no federal agency has 'primary jurisdiction' over the OCS; agency jurisdiction [under the OCS] turns on the particular activity at issue. *See* G. Coggins and C. Wilkinson, Federal Public Land and Resources Law 434 (1981)." The Court concluded that this suggests that § 810 "does not apply to the OCS." *Id.* at 19. For coastal waters within the three-mile limit, however, the Corps of Engineers has primary jurisdiction to manage and protect the United States' navigational servitude. *See e.g.*, 33 U.S.C. § 1 *et seq.* ("It shall be the duty of the Secretary of the Army to prescribe regulations for . . . the navigable waters . . . , covering *all matters* not specifically delegated by law to some other executive department." (emphasis added)); and 33 C.F.R. Chapter II.

D. The Decision Below Conflicts with the Reasoning of *United States v. California* and with Congressional Intent Under the Submerged Lands Act

In holding that California lacked title to the lands and resources in the coastal waters off its shores, the Court in *United States v. California*, 332 U.S. 19 (1947), implicitly recognized ownership on the part of the United States in the three-mile

waters and the lands underneath.[10] Though the Court did not expressly hold that the United States had "title," the language used by the Court strongly suggests that its "interest" is a *property* interest, title to which is held by the United States.[11] Indeed, Justice Frankfurter's dissent was based on the fact that the Court refrained from *explicitly* finding a proprietary interest in the area while at the same time finding "national dominion" by the United States over this area, a concept which *implies* property ownership. *Id.* at 43-45. Accepting the majority's conclusion that California lacked ownership of the three-mile belt, Justice Frankfurter believed that at best this area was unclaimed. While not doubting that the Federal government had the power to claim title to this area, Justice Frankfurter believed such a determination was for Congress, not the Court, to make. *Id.* at 45-46.

Just such a determination was made by Congress in enacting the Submerged Lands Act, 67 Stat. 29, 43 U.S.C.A. § 1301 *et seq.* (1986 ed.).[12] As noted in *Gambell,* this Act

[10] The Court refused to extend "the *Pollard* inland water rule to the ocean area." 332 U.S. at 30-31. "In the *Pollard* case it was held, in effect, that the original states owned in trust for their people the navigable tidewaters between high and low water mark . . . as an inseparable attribute of State Sovereignty." *Id.* at 31.

[11] For example, the Court stated:

> The justiciability of this controversy rests therefore on conflicting claims of alleged invasions of *interests in property* . . .," 332 U.S. at 25; "after determining in general who *owns* the three-mile belt here involved, the Court [can hold further hearings to determine the proper demarcation of that belt]," *id.* at 26; ". . . *acquisition,* as it were, of the three-mile belt [has] been accomplished by the National government . . .," *id.* at 34; "We decide . . . that the Federal Government rather than the state has paramount *rights in* and power over the belt, an incident to which is *full dominion over* the resources of the soil under that water area, including oil," *id.* at 38-39; "Assuming that government agents could by conduct, short of a Congressional *surrender of title or interest,* preclude the Government from asserting its legal rights, we cannot say it has done so here."

Id. at 39 (emphasis added).

[12] *See generally,* 1953 U.S. Code Cong. and Admin. News, 1385 and 1418-22.

grants title to the submerged lands within the three-mile limit to the various States. *Gambell,* slip op. at 14.[13] However, in making this grant to the States, the Act "expressly recognized that the United States retained 'all its navigational servitude *and* rights in and powers of regulation and control of said lands and navigable waters . . . .'" *United States v. Rands,* 389 U.S. 121, 127 (1967), *quoting* the Submerged Lands Act, 43 U.S.C. § 1314(a), App. G-5 (emphasis added).

In construing the Submerged Lands Act, *United States v. California,* 436 U.S. 32 (1978) held that the proprietary interests of the United States in the submerged lands and natural resources passed to the State of California:

> [w]ith the exception, of course, of any *interests retained* by the United States . . . . For example . . . the retention by the United States of its *navigational servitude* and its "rights in and powers of regulation and control of said lands and navigable waters . . . ." 43 U.S.C. § 1314(a).

Id. at 41 n.18 (emphasis added).

The navigable servitude retained by the United States under the Submerged Lands Act is an interest in water, title to which is in the United States.[14] Because ANILCA did not purport to give away this interest, the navigational servitude in the waters of Cube Cove *remains* as an "interest" in water, "the title to which is in the United States after the date of enactment

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[13] Section 1311 conveys to the States the "title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters . . . ." 43 U.S.C.A. § 1311(a), App. G-5. Through the Alaska Statehood Act, the Submerged Lands Act grants title to the submerged lands within the three-mile limit off the coast of Alaska to the State of Alaska. *Gambell,* slip op. at 14.

[14] *Cf.,* 1953 U.S. Code Cong. and Admin. News, at 1422:

> The committee is unable to determine whether or not the Supreme Court held that the United States has actual title to the [three mile marginal belt] . . . [but the bill] will establish, confirm, and vest in the littoral states . . . *such title* and rights as the Federal Government has, *subject to the reservations contained therein.* (Emphasis added.)

of [ANILCA]," making the servitude "public lands" for purposes of § 810. Unless "public lands" include the navigational servitude retained by the United States, there will be no meaning to that part of the statutory definition dealing with "waters, and interests therein" for Alaska's coastal waters.

E. The Decision Below Conflicts with the Reasoning of *Cherokee Nation* and Other Decisions that Strictly Guard the United States' Fullest Rights in and Powers over the Navigational Servitude

Cherokee Nation held that the conveyance of fee simple title to a portion of the riverbed under the Arkansas River did not give the tribe an interest requiring compensation when their sand and gravel deposits were damaged by navigational improvements undertaken by the United States. Even though the navigational servitude had not been reserved in the treaty conveying the riverbed, the Court strictly guarded the United States' full rights in the servitude.

Although the Court also relied on the Commerce Clause as a source of regulatory power over navigable waters, the reasoning in *Cherokee Nation* is consistent with the understanding that the navigational servitude also is a property interest, even in inland waters, to which the United States holds title (and which the United States could, under some circumstances, convey to another party). Initially, the Court addressed the troubling fact that the United States failed to reserve the navigational servitude in the treaty conveying the riverbed, and the tribe's argument that this resulted in the United States abandoning its navigational servitude. *Cherokee Nation,* slip op. at 2, 3, 5.

The Court first observed that the Court of Appeals "found it 'certain [that] the United States retained a navigational servitude in the Arkansas River." *Id.* at 3. The Court next noted that in the original Supreme Court litigation to establish title to the riverbed, the "parties, including respondent here, clearly understood that the navigational servitude was dominant no matter how the question of riverbed ownership was resolved." *Id.* at 6. The Court's concern with the failure to reserve the servitude is consistent with the understanding that

the United States holds title to the servitude, and that under some circumstances, at least, it can convey that title.[15]

The next step in the Court's reasoning in *Cherokee Nation* also is consistent with the conception of the servitude as a property interest. The Court observed that the geographic limit of the navigational servitude is "the entire stream and the stream bed below ordinary highwater mark." *Id.* at 4. The Court quoted with approval from the dissent below, which noted that "the issue is whether the segment or interest is *within* the definition and scope of the [navigational servitude] doctrine *geographically.*" *Id.* at 3 (emphasis added). (If it is, and the interference is in aid of navigation, there is no taking.)

The final step in the reasoning in *Cherokee Nation,* also consistent with the notion of the servitude as property, was the Court's "refus[al] to give a still more expansive and novel reading of respondent's property interest. There is certainly nothing in *Choctaw Nation* [holding that the tribe was conveyed the fee to the riverbed] that suggests such a broad reading of the conveyance." *Id.* at 6. The Court continued by stating that:

> Any other conclusion would be wholly extraordinary, for we have repeatedly held that the navigational servitude applies to *all* holders of riparian and riverbed interests. [Citations omitted.] Indeed, even when the sovereign States gain "the absolute right to all their navigable waters and the soils under them for their own common use" . . . , this "absolute right" is unquestionably subject to "the paramount power of the United States . . . ." If the States themselves are subject to this servitude, we cannot conclude that respondent—though granted a degree of sovereignity over tribal lands—gained an exemption from the servitude simply because it received title to the

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[15] The Court also stated that in the earlier action to establish title the Court "expressly noted that the United States had no interest in retaining title to the submerged lands because 'it had all it was concerned with in its *navigational easement* via the constitutional power over commerce.' " *Id.* at 6 (emphasis in original).

> riverbed interest. Such a waiver . . . must be "surrendered in unmistakable terms."

Id. at 7.

The reasoning in *Cherokee Nation* is based on the recognition that the navigational servitude in an interest that the United States might have conveyed, though only if "surrendered in unmistakable terms." *Id.* at 7. This suggests that the United States holds some title it can convey. The holding and reasoning of *Cherokee Nation* also imply that the navigational servitude must be strictly guarded, and that none of the interests of the United States, least of all title, should be surrendered lightly. This is in conflict with the decision below.

Other decisions of the Supreme Court illsutrate that while the origin of the navigational servitude may be in the Commerce Clause (at least for inland waters), its attributes are nonetheless attributes of property ownership, inuring to the United States in its sovereign capacity.[16] Consistent with such analysis, these decisions have strictly guarded the United States' fullest rights in, and powers over, the navigational servitude. The decision below is in conflict with the reasoning of these cases as well.

2. The Decision Below Construing the Precise Geographic Designation "Within the Monument" as Not Having Its "Plain Meaning"—"Within the Boundaries of the Monument"—Conflicts with the Reasoning of this Court in *Gambell* and the Eighth Circuit in *Minnesota v. Block*

The decision below construing the precise geographic designation "within the Monument" in § 503(d) of ANILCA

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[16] These property attributes include "dominion over the water power" of a navigable stream, *United States v. Chandler-Dunbar*, 229 U.S. 53, 63 (1913) (*accord, United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 424 (1941)), rights of occupancy, *Scranton v. Wheeler*, 179 U.S. 141, 164 (1900), the "right to exclude" and dominance over conflicting interests, the power to "appropriate", and the power to "grant" or withhold the value of the flow of a stream. *United States v. Twin City Power Company*, 350 U.S. 222, 224-28 (1956). The Courts' terminology indicates that the navigable waters of the United States "are the public property of the Nation." *United States v. Rands*, 389 U.S. 121, 122-23 (1967) (*accord, United States v. Chandler-Dunbar*, 229 U.S. at 76; *Scranton*, 179 U.S. at 159; *Gilman v. Philadelphia*, 3 Wall. 713, 724-25 (1865)).

as not having the plain meaning "within the boundaries of the Monument" conflicts with the reasoning of this Court in *Amoco Production Co. v. Gambell,* No. 85-1239 (U.S. March 24, 1987), and the Eighth Circuit in *Minnesota v. Block,* 660 F.2d 1240 (8th Cir. 1981), both of which construe similar geographic designations to plainly mean "within the boundaries" of the designated area.[17]

The *Gambell* case, like the present case, involved the determination of the proper scope to be given an analogous geographic designation in ANILCA. In *Gambell* the Court reasoned that the term "in Alaska" in the subsistence study provision of § 810 of ANILCA had "a precise geographic/political meaning . . ., [with] boundaries . . . [which] can be delineated with exactitude." *Gambell,* slip op. at 14. The Court concluded that the "plain meaning", *id.* at 16, was "within the boundaries of the State of Alaska." *Id.* at 13.

The *Gambell* Court further reasoned that where a geographic "expression is capable of precise definition, we will give effect to that meaning absent strong evidence Congress actually intended another meaning." *Gambell,* slip op. at 15. This is in " 'recognition that Congressmen typically vote on the language of a bill, . . . [and] that the legislative purpose is expressed by the ordinary meaning of the words used.' " *Id.* The Court concluded that the term "in Alaska" does not represent "that 'exceptional case' where acceptance of the plain meaning of a word would 'thwart the obvious purpose of the statute'." *Id.* at 16.

The *Minnesota* case, like the present case, also involved the determination of the proper scope to be given a precise geographic designation in an analogous federal conservation statute. In *Minnesota,* the Eighth Circuit reasoned that the term "within the wilderness" in the Boundary Waters Canoe Area Wilderness Act, by its "plain language," 660 F.2d at 1248 n.15, included all lands and waters "within the boundaries of the

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[17] Section 503(d) provides: "Within the Monuments, the Secretary [of Agriculture] shall not permit the sale of [sic] harvesting of timber; . . . ." App. G-2.

BWCAW," including non-federal inholdings owned by the State. *Id.* at 1248.

In contrast, the Court of Appeals refused to recognize that the "plain meaning" of "within the Monument" is "within the boundaries of the Monument". The Court of Appeals also erred in finding a conflict with the conveyance of the inholding to Shee Atika in § 506(c) of ANILCA. The court ignored the value of the inholding for exchange, and concluded, without any evidence, that timber harvesting was the inholding's "only real economic value." 803 F.2d at 1024, App. A-16. The court strained to support its conclusion that the inholding had no exchange value, by reasoning that—because the owner's consent is necessary—the "conclusion is unreasonable." *Id.* The Court of Appeals did not attempt the more difficult task of explaining how the requirement for the owner's consent to an exchange made the exchange transaction different from any other business transaction; consent is required just as much to harvest and sell the timber as it is to exchange it.

The Court of Appeals also erred by reasoning that the other timber prohibitions applicable to the public lands within the Monument would make § 503(d) meaningless only if they prohibited harvesting on public lands "expressly or by reference to another statute." *Id.* There is no support for this novel cannon of statutory construction.

This Court should grant the writ to resolve the conflicting reasoning used to interpret similar geographic designations in the same statute (ANILCA) and in an analogous federal conservation statute.

3. The Decision Below Directing Entry of Summary Judgment, *Sua Sponte*, Against Petitioners Who Had No Opportunity Before Either the District Court or the Court of Appeals to Conduct Discovery or to Demonstrate That There Were Disputed Issues of Material Fact, Conflicts with *Fountain v. Filson* and Other Decisions of this Court

In the decision below the Court of Appeals moved *sua sponte* to hold that the Corps' environmental impact statement was fully adequate and that the decision to issue a permit for

Shee Atika's log transfer facility was valid—even though these issues included points which had been reserved by Petitioners in their request for partial summary judgment, had not been considered by the district court, and were the subject of an outstanding affidavit filed by Petitioners pursuant to Rule 56(f), Fed. R. Civ. P. 803 F.2d at 1022, App. A-12. The decision of the Court of Appeals conflicts with *Fountain v. Filson,* 336 U.S. 681 (1949), and with the underlying reasoning of other decisions of this Court following the same principles.

The decision raises important questions about the proper standards to be followed by the Courts of Appeals in reviewing grants of summary judgment, and the appellate courts' appropriate role vis-a-vis the traditional fact-finding function of the district courts. Both the holding and the reasoning of the decision below so far depart from accepted precedent as to call for the exercise of this Court's supervisory power.

A. The Decision Below Raises Serious Implications for the Use of Summary Judgment and Calls for an Exercise of this Court's Power of Supervision

In the decision below, the Court of Appeals was faced with a *single issue* concerning the adequacy of the Corps' EIS—whether the Corp's failure to consider the alternative of a land exchange rendered the EIS inadequate under NEPA.[18] The Court of Appeals found that the alternative was not a reasonable one and reversed the district court's grant of partial summary judgment on this issue. Rather than remanding however, the Court of Appeals took a quantum leap forward and decided, *sua sponte,* that there were no issues of material fact remaining with regard to Petitioners' *other* NEPA claims, and that Respondents were entitled to entry of summary judgment on the adequacy of the EIS and the validity of the log transfer facility permit.

In a single stroke, the Court of Appeals disposed of Petitioners' case without *any* notice of its intent to do so. The Court of Appeal's decision conflicts with the established case

[18] Once the EIS was found inadequate, the Corps' permits were necessarily invalid.

law of this Court concerning the role of appellate courts and the opportunity for a party to be heard.[19] Most importantly, the decision raises such serious implications for the future of Rule 56 and so far departs from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.[20]

Summary judgment is a crucial procedural device which allows the Federal judiciary to "isolate and dispose of factually unsupported claims or defenses," *Celotex v. Catrett*, 106 S. Ct. 2548, 2553 (1986). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as

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[19] *Hammond v. Schappi Bus Line*, 275 U.S. 164 (1927); *Hormel v. Helvering*, 312 U.S. 552 (1941); *Fountain v. Filson*, 336 U.S. 681 (1949); *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949); *DeMarco v. United States*, 415 U.S. 449 (1974); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

[20] In contrast to what the court stated (that "review of the adequacy of an EIS is a legal question") and what the court did (enter summary judgment), 803 F.2d at 1022, App. A-12, the court did acknowledge the correct standard for reviewing the adequacy of an EIS: § 706(2)(D) of the Administrative Procedure Act, 5 U.S.C.A. § 706(2)(D). *See e.g., Lathan v. Brinegar*, 506 F.2d 677, 692-93 (9th Cir. 1974) (*en banc*); *Northwest Indian Cemetary Protection Association v. Peterson*, 795 F.2d 688 (9th Cir. 1986).

The court erred, however, in its *application* of this standard when it preempted petitioners' right to discovery and an evidentiary hearing on these remaining claims. An adequacy determination requires a "hard look" at the *facts*—including the data and methodology that underlie an EIS. *Citizens for Balanced Environment and Transportation v. Volpe*, 650 F.2d 455 (2d Cir. 1981); *Johnston v. Davis*, 698 F.2d 1088 (10th Cir. 1983). *See also Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979); *Izaak Walton League of America v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981); *Township of Springfield v. Lewis*, 702 F.2d 426 (3rd Cir. 1983); *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983); *Druid Hills Civic Association v. FHA*, 772 F.2d 700 (11th Cir. 1985), *cert. denied*, 454 U.S. 1092. Here petitioners were afforded no opportunity to submit evidence about methodology and data. The appellate court's *sua sponte* determination that the EIS was "technically sophisticated and analytically rigorous," 803 F.2d at 1020, App. A-8, 9, violates its duties under § 706(2)(D) and Fed. R. Civ. P. 56, and gives rise to the conflict presented here.

On the other hand, if the Ninth Circuit's holding is interpreted as creating a new standard of review—one that *precludes* factually-based challenges to the adequacy of an EIS or the decision to proceed with a project—this also would present a conflict.

an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Id.* at 2555.

When misused, however, summary judgment procedures can result in the sacrifice of justice at the expense of speed. It is precisely because of the centrality of summary judgment to the Federal Rules of Civil Procedure that the interests of litigants who seek to invoke Rule 56's procedures should not be lightly cast aside. Whether proceeding by trial or by summary disposition, due process requires that all litigants be afforded notice and an opportunity to be heard. *Anderson National Bank v. Luckett,* 321 U.S. 233, 246 (1944); *Societe Internationale v. Rogers,* 357 U.S. 197, 209 (1958).

Yet the manner in which the Court of Appeals has proceeded here—directing summary judgment, *sua sponte,* on issues not passed upon by the district court, without notice to the parties, without any opportunity for discovery or the submission of evidence, and in the face of a pending Rule 56(f) affidavit—conflicts with these principles.[21] If allowed to stand, this decision will result in future litigants avoiding the use of summary judgment to isolate and clarify their claims, for fear of an unexpected decision on claims not yet ripe for full consideration and rightfully not presented before the trial court for summary disposition. The end result will be to defeat the very purpose for which Rule 56 exists. *See Indiana Port,* 702 F.2d at 110.

Because of the profound impact such a development will have on the thousands of litigants who yearly invoke the jurisdiction of the Federal courts, and because the Ninth Circuit's resolution so directly conflicts with precedents of this Court, the Court should grant the writ and exercise its supervisory powers.

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[21] Though perhaps less than clear from the language of the court's holding itself, it is clear that the Court of Appeals was aware that it was disposing of petitioners' reserved NEPA claims when it denied petitioners' motion for reconsideration.

B. The Decision Below Conflicts with this Court's Holding in *Fountain v. Filson*

In *Fountain v. Filson,* 336 U.S. 681 (1949), the respondents challenged the district court's grant of summary judgment to the petitioner on the issue of the existence of a resulting trust; on appeal, the District of Columbia Circuit Court of Appeals reversed the district court's grant of summary judgment, and proceeded *sua sponte* to direct entry of summary judgment for the respondents on a related claim on which the district court had not passed, and on which petitioner had had no opportunity to present arguments or to dispute the facts. Petitioner's timely motion for a modification of the appellate court's order, to permit trial on the remaining claim, was denied. Upon review, this Court held that the Court of Appeals' *sua sponte* grant of summary judgment for respondents on a new issue, as to which the petitioner had had no opportunity to present a defense or dispute the facts in the trial court, was in error. Accordingly, the judgment of the Court of Appeals was reversed, and the cause remanded to the district court for further proceedings concerning issues not passed upon in that court.

As in *Fountain,* Respondents appealed from the district court's grant of partial summary judgment to Petitioners (on the issue of the inadequacy of the EIS in light of its failure to study the alternative of a land exchange). As in *Fountain,* the Court of Appeals here not only reversed the district court's grant of summary judgment, but also, as in *Fountain,* proceeded *sua sponte* to direct summary judgment against Petitioners on their *remaining* claims. As in *Fountain,* these were claims on which the district court had not passed, and on which Petitioners had had no opportunity to present arguments or to dispute the facts. Petitioners' timely motion for reconsideration, requesting a remand of the case for trial on the remaining NEPA claims, was denied without opinion. The Court of Appeal's holding is in direct conflict with *Fountain.*

Following the same principles which underlie the holding in *Fountain,* this Court has held on numerous occasions that absent "exceptional cases . . . where injustice might otherwise result," *Hormel,* 312 U.S. at 556-57, where no issue remains and the facts are undisputed, *Turner v. City of Memphis, Tennessee,*

369 U.S. 350, 353 (1962), or where "the proper resolution is beyond any doubt," *Singleton,* 428 U.S. at 2877, none of which circumstances apply here, reviewing courts should not reach out to find facts and make their own determination of questions not passed upon in the courts below. *Pullman-Standard,* 456 U.S. at 284-86, 291-93; *Hammond,* 275 U.S. at 171-72; *Mercury Construction Co.,* 460 U.S. at 29; *Weade,* 337 U.S. at 808; *DeMarco,* 415 U.S. at 450.

These decisions rest in part upon deeply held notions about the distinct responsibilities, and concomitant expertise, of trial courts and reviewing courts. But they also rest upon concerns that a party be allowed to present her case before being ushered out of court. These latter concerns are particularly strong where an appellate court acts *sua sponte* to dispose of a case or claim by directing the entry of summary judgment, without notice to the parties, and without the submission of briefs or argument. Where the appellate court neither calls for briefing nor provides notice of its intent to render a final judgment on a matter, *and* where the district court has not previously passed on the matter, the end result is disposition by surprise, without a full and fair opportunity (indeed without *any* opportunity) to be heard, as due process requires. *Hormel* at 556-60. The decision below conflicts with the principles of these cases.

C. The Decision Below Conflicts with Traditional Principles of Summary Judgment Law

Even assuming, *ad arguendo,* that consideration by the appellate court of petitioners' outstanding NEPA claims was proper in the absence of prior consideration of these claims by the district court, and even assuming, *ad arguendo,* the propriety of *sua sponte* grants of summary judgment by an appellate court, the Ninth Circuit has failed to adhere to the most basic standards of summary judgment law, and in so doing, has contravened the spirit, purpose, and policies of Rule 56.

This Court has stated that summary judgment is appropriate where the record before the court, together with any affidavits submitted by the parties, shows *clearly* that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corporation v.*

Catrett, 106 S.Ct. 2548, 2552 (1986); *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 467 (1962). The Court is *not* to weigh the evidence, but merely to determine that there are no "genuine factual issues that can be resolved only be a finder of fact." *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505, 2511 (1986). In carrying out this task, the Court is required to look at the record *as a whole,* in the light *most favorable* to the party opposing the motion.[22] In the face of any doubt about the existence of a factual dispute, summary judgment is to be denied.[23] The Ninth Circuit's grant of summary judgment to Respondents, without a ruling on their Rule 56(f) affidavit, is in conflict with these principles.

In a series of three decisions decided last Term, this Court addressed the standards to be applied under Rule 56(c) and (e), noting that the party opposing a motion for summary judgment may not rest on mere allegations in the complaint but must set forth specific facts showing that there is a genuine issue for trial. *Anderson,* 106 S. Ct. at 2511, 2514; *Celotex,* 106 S. Ct. at 2553; *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation,* 106 S.Ct. 1348, 1356 (1986). This requirement, the Court made clear:

> in turn is qualified by Rule 56(f)'s provision that summary judgment *be refused* where the nonmoving party has not had the opportunity *to discover information* that is essential to his opposition.

Anderson at 2511 n.5 (emphasis added). *See also, Celotex* at 2552-5; *Anderson* at 2514.

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[22] *Bishop v. Wood,* 426 U.S. 341, 347 n.11 (1976); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59 (1970); *United States v. Diebold,* 369 U.S. 654, 655 (1962); *Poller,* 368 U.S. at 473.

[23] *Lemelson v. TRW, Inc.,* 760 F.2d 1254, 1261 (Fed. Cir. 1985); *Carlin Communication v. Southern Bell,* 802 F.2d 1352, 1356 (11th Cir. 1986); *see generally* 10 Wright, Miller, and Kane, FEDERAL PRACTICE AND PROCEDURE, Ch. 8, § 2716, at 643-46 (1983).

The Ninth Circuit's entry of summary judgment for Respondents on the adequacy of the EIS and the validity of the LTF permit, in the face of petitioners' outstanding Rule 56(f) affidavit (which it had been unnecessary for the district court to rule upon), is in conflict with these principles.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the Ninth Circuit.

Dated: April 10, 1987

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

APPENDIX A

CITY OF ANGOON, THE SIERRA CLUB, THE WILDERNESS SOCIETY, *et al.*,
Plaintiffs-Appellees,

v.

DONALD HODEL, Secretary of the Interior, *et al,*
SHEE ATIKA, INC. and SEALASKA CORP.,
Defendants-Appellants.

CITY OF ANGOON, THE SIERRA CLUB, THE WILDERNESS SOCIETY, *et al.*,
Plaintiffs-Appellants,

v.

DONALD HODEL, Secretary of the Interior, *et al.*,
Defendants,

and

SHEE ATIKA, INC.
Defendant-Appellee.

Nos. 85-4413, 86-3582, 86-3617 and 86-3618

United States Court of Appeals

NINTH CIRCUIT.

Argued and Submitted Sept. 3, 1986.
Decided Oct. 31, 1986.

Frederick P. Furth, Jeffrey Glick, Furth, Fahrner, Bleumle & Mason, San Francisco, Cal., for City of Angoon.

Durwood Zaelke, Sierra Club Legal Defense Fund, Inc., Washington, D.C., for Sierra Club.

F. Henry Habicht, II, Asst. Atty. Gen., Bruce Landon, Atty., Dept. of Justice, Anchorage, Alaska, Robert L. Klarquist, David C. Shilton, Dept. of Justice, Washington, D.C., for Federal defendants—appellants.

Jonathan K. Tillinghast, Stephen F. Sorensen, Birch, Horton, Bittner, Pestinger & Anderson, Juneau, Alaska, for Sealaska Corp.

Richard Anthony Baenen, Pierre J. LaForce, Wilkinson, Barker, Knauer & Quinn, Washington, D.C., Jacquelyn R. Luke, Middleton, Timme & McKay, Anchorage, Alaska, for Shee Atika, Inc.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

Before SNEED, KENNEDY, and WIGGINS, Circuit Judges.

PER CURIAM:

Appellants appeal from a partial summary judgment invalidating a permit for the construction and operation of a log transfer facility on Admiralty Island and enjoining its use. Jurisdiction to hear this appeal is provided by 28 U.S.C. § 1292(a)(1). The district court held that the environmental impact statement (EIS) prepared in connection with the permit was inadequate under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370a, because it failed to consider an alternative whereby the land on Admiralty Island could be exchanged for land elsewhere. Appellees cross-appeal from the district court's dismissal of their claims that proposed timber harvesting on Admiralty Island violates the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1629a, and the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16 and 43 U.S.C.). Jurisdiction to hear this appeal is provided by 28 U.S.C. § 1291.

We reverse the district court's judgment invalidating the permit and enjoining use of the log transfer facility. We affirm in all other respects.

I.

FACTS AND PROCEEDINGS BELOW

Appellants, defendants below, are Shee Atika, Inc. (Shee Atika), an Alaska Native Village Corporation that claims a surface estate in some 23,000 acres of Admiralty Island; Sealaska Corporation (Sealaska), an Alaska Native Regional Corporation that owns subsurface rights in land owned by Shee Atika; federal officials in the Department of the Army who issue

permits under section 404 of the Clean Water Act, 33 U.S.C. § 1344, and section 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403; and other federal officials who administer laws relating to Native Americans. We refer to appellants collectively as Shee Atika-Sealaska.

Appellee cross-appellants, plaintiffs below, are the City of Angoon (Angoon), the only permanent settlement on Admiralty Island; the Sierra Club, and the Wilderness Society, both national conservation organizations. We refer to appellees collectively as Sierra-Angoon.

This litigation is the latest episode in a twelve-year struggle which reflects badly upon the ability of the three branches of the federal government to resolve disputes reasonably expeditiously. It is a struggle in which Shee Atika attempts to realize economic benefits from the settlement of its aboriginal claims under ANCSA. ANCSA authorized the Secretary of the Interior (Secretary) to convey to Shee Atika a surface estate in some 23,000 acres of land. 43 U.S.C. § 1613(h)(3). In exchange, the Native shareholders of Shee Atika relinquished all their aboriginal claims.

In 1975, Shee Atika designated lands in the southwest portion of Admiralty Island for the exchange. The Sierra Club and Angoon immediately contested the conveyance. The Sierra Club wishes to protect the wilderness character of Admiralty Island. The President and Congress recognized the island's ecological importance by designating 920,000 of its 1.2 million acres as a national monument. Presidential Proclamation No. 4611, 3 C.F.R. 69 (1978); ANILCA, § 503(b), 94 Stat. 2371, 2399 (1980). Angoon is afraid that timber harvesting will disrupt the traditional subsistence culture of its 500 Tlinget Indian inhabitants.

Responding to pressure, Shee Atika agreed to exchange its land in the southwest of Admiralty Island for land in the northwest of the island. Its new selection is farther from Angoon and was rated environmentally less sensitive by the United States Forest Service. Excerpt of Record (E.R.) at 145. Congress approved the exchange in section 506(c) of ANILCA, 94 Stat. 2371, 2409.

The Sierra Club and Angoon challenged the new conveyance both before the Department of the Interior and in district court. The Sierra Club also filed a notice of *lis pendens* in the Alaska land records, which prevented Shee Atika from obtaining commercial financing for its timber development plans. Congress responded by enacting section 315 of the Interior Appropriations Act, Pub. L. No. 97-394, 96 Stat. 1998 (1983), which confirmed the conveyance to Shee Atika "in all respects." [1]

The Sierra Club and Angoon returned to district court to protest Shee Atika's plans to harvest timber on its land. They objected to the permit issued by the Army Corps of Engineers (Corps) for a log transfer facility on the ground that the Corps had not prepared an EIS as required by NEPA, 42 U.S.C. § 4332. The Corps suspended the permit in March, 1983 pending completion of an EIS. Shee Atika nevertheless harvested timber during the spring of 1983, moving the logs by means less efficient than a log transfer facility. The Sierra Club and Angoon interrupted this activity by obtaining a preliminary injunction against timber harvesting. They claimed, and the district court agreed, that ANILCA prohibits timber harvesting on Shee Atika's land because it is located within a national monument.

Shee Atika appealed to this court, and we vacated the preliminary injunction. *City of Angoon v. Marsh (Angoon I)*, 749 F.2d 1413 (9th Cir. 1985). From the language and legislative history of ANILCA, we concluded that Congress did not intend to prohibit timber harvesting on private land located

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[1] This was not Congress' last word on the subject. On January 9, 1986, Congress passed section 2(b) of Pub. L. No. 99-235, 99 Stat. 1761 (1986), which authorized the Secretary of the Interior to negotiate an agreement with Shee Atika under which timber harvesting on Admiralty Island would cease. On August 11, 1986, the House of Representatives passed the Admiralty Island Exchange Act, which proposes a transfer of specified land in exchange for Shee Atika's Admiralty Island holdings. 132 Cong. Rec. H5810, H5816 (daily ed. Aug. 11, 1986). Senate action is imminent. These events took place after this appeal was filed. Neither congressional action casts doubt on Shee Atika's rights in its Admiralty Island land. Rather, both propose negotiating voluntary agreements with Shee Atika.

within national monuments. We also looked to the purpose of ANCSA, which authorized the conveyance to Shee Atika to settle its claims "in conformity with the real economic and social needs of Natives," 43 U.S.C. § 1601(b). It was "inconceivable that Congress would have extinguished their aboriginal claims and insured their economic well being by forbidding the only real economic use of the lands so conveyed." 749 F.2d at 1418.

On remand the district court consolidated four cases involving Shee Atika's land. Sierra-Angoon filed a consolidated complaint on April 29, 1985. They challenged the original conveyance to Shee Atika of land on Admiralty Island. They objected to the new permit for a log transfer facility which the Corps had issued after completing an EIS. And they protested all timber harvesting on Admiralty Island. Sierra-Angoon based their claims variously on provisions of ANCSA, ANILCA, NEPA, and the Clean Water Act; on the federal trust responsibility owed to Angoon; and on the due process and property clauses of the United States Constitution.

All parties moved for summary judgment. The district court disposed of the motions in two orders dated October 17, 1985; in a third order dated November 27, 1985; and in a partial final judgment dated December 27, 1985. The court granted partial summary judgment for Sierra-Angoon on their claim that the log transfer facility permit was invalid under NEPA because the EIS did not study an alternative by which Shee Atika could exchange its Admiralty Island land for land elsewhere. The court granted partial summary judgment for Shee Atika-Sealaska on all other claims, except a claim arising under section 402 of the Clean Water Act, 33 U.S.C. § 1342, which was still the subject of an administrative appeal.

As already indicated, Shee Atika-Sealaska appeal from so much of the November 27 order as held that the EIS was inadequate. Sierra-Angoon cross-appeal from so much of the judgment of December 27 as dismissed three of their claims. First, they claim that Congress conveyed the Admiralty Island land to Shee Atika intending that Shee Atika exchange it for land elsewhere and not use it for timber harvesting. Second,

they claim that Shee Atika's land is subject to management restrictions under section 22(k) of ANCSA, 43 U.S.C. § 1621(k). Third, they challenge timber harvesting on Admiralty Island because certain federal agencies failed to prepare subsistence evaluations required by section 810 of ANILCA, 16 U.S.C. § 3120, and because the Secretary of the Interior failed to protect access to subsistence resources under section 811 of ANILCA, 16 U.S.C. § 3121.

II.

STANDARD OF REVIEW

This court reviews de novo a trial court's grant of summary judgment. *Darring v. Kincheloe,* 783 F.2d 874, 876 (9th Cir. 1986). The standard used by the trial court under Fed. R. Civ. P. 56(c) thus governs the appellate court's review. This court determines, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

III.

NATIONAL ENVIRONMENTAL POLICY ACT

It has been said many times that NEPA is an "essentially procedural" statute. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 558, 98 S.Ct.1197, 1219, 55 L.Ed.2d 460 (1978). We enforce NEPA under our authority to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law," Administrative Procedure Act, 5 U.S.C. § 706(2)(D). *Lathan v. Brinegar,* 506 F.2d 677, 692-93 (9th Cir. 1974) (en banc). One of the procedures prescribed by NEPA is that:

> all agencies of the Federal Government shall—
>
> . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2).

This "detailed statement" is the EIS. The present case specifically tests the requirement that an EIS discuss "alternatives to the proposed action." In applying this requirement, we employ a "rule of reason" in judging whether the agency described "those alternatives necessary to permit a 'reasoned choice.'" *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (citations omitted). "[T]he touchstone for our inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation." *Id.* In particular, an EIS need not consider "remote and speculative" alternatives whose effects cannot be readily ascertained. *Vermont Yankee*, 435 U.S. at 551, 98 S.Ct. at 1215 (quoting *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972); *see Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973), *cert. denied*, 416 U.S. 961, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974).

Before reissuing the permit for the log transfer facility, the Corps spent nineteen months preparing an EIS that is over 120 pages long, exclusive of maps, diagrams, and appendices. E.R. at 139. The EIS is technically sophisticated and analytically

rigorous. It describes seven alternatives. One, the "no-action" alternative, considers the effects of denying the permit. The other six alternatives involve different ways of transferring logs either to the water for transport or directly on to vessels. The Corp finally approved an alternative that differs slightly from Shee Atika's original proposal. In addition, the Corps imposed twelve special conditions on the permit in order to mitigate adverse environmental effects. E.R. at 340-42.

The heart of the Sierra-Angoon argument is that the EIS is inadequate because it does not consider in detail the alternative that Shee Atika could exchange its Admiralty Island holdings for land elsewhere. In fact, the Corps adverted to this possibility, but decided not to develop it at length. First, the Corps observed that an exchange would not satisfy the purpose for which Shee Atika sought the permit: "safe, cost effective means of transferring timber harvested on their land to market." E.R. at 163. Second, the Corps reasoned that the exchange alternative was remote and speculative because it was contingent on congressional action and had not been reduced to a specific proposal. *Id.* at 153, 170. Third, the Corps noted that, as far as it was concerned, the exchange alternative was equivalent to the no-action alternative because it could do no more to promote a trade. *Id.* And the Corps doubted whether it could properly withhold a permit in order to force Shee Atika to consent to an exchange that it otherwise would have refused. *Id.*

The district court considered and rejected each of the Corps' reasons for its abbreviated discussion of the exchange alternative. The district court attacked the Corps' statement of the permit's purpose. Purporting to rely on the Corps' regulations, the district court restated the purpose in terms of a broad, generic public benefit: "commercial timber harvesting." E.R. at 55. But the Corps' regulations recognize that "every application has both an applicant's purpose and need and a public purpose and need." 33 C.F.R. Part 230, App. B (11)(b)(4) (1985). The regulations, however, specify that "[t]he EIS shall document a reasonable number and range of alternatives which would satisfy the purpose and need (as

described in paragraph (11)(b)(4) above) for which the applicant has submitted his proposal." *Id.* at (11)(b)(5)(b). The Corps characterized the relevant "purpose and need" as providing a "safe, cost effective means of transferring timber harvested on [Shee Atika's] land to market," E.R. at 163, a purpose broader than constructing a specific log transfer facility at a designated location in Cube Cove, as Shee Atika requested. The district court erred when it adopted as the "purpose and need" the even broader concept "commercial timber harvesting." This formulation appears to make a broad social interest the exclusive "purpose and need." The Corps' statement is more balanced. We have said before, "The preparation of [an EIS] necessarily calls for judgment, and that judgment is the agency's." *Lathan v. Brinegar*, 506 F.2d at 693.

Acceptance of the Corps' statement of purpose makes consideration of the exchange alternative irrelevant. *See Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974). When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.

However the permit's purpose is characterized, the exchange alternative is too remote and speculative. Congress explicitly conveyed the Admiralty Island land to Shee Atika, and Congress would have to authorize any substitute conveyance made in exchange. Shee Atika would have to consent. Should the tract to be exchanged be quite valuable, Congress might refuse to offer it; if it is less valuable, Shee Atika might refuse to accept it. To require the Corps to select one or more tracts for exchange which, in its view, might induce both an offer and acceptance is to visit upon it a task that would involve almost endless speculation.

It is true that the fact that an alternative requires legislative action does not automatically justify excluding it from an EIS.[2] The alternatives, however, must be ascertainable and reason-

[2] If an alternative requires congressional action, it will qualify for inclusion in an EIS only in very rare circumstances. In *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972), the Court of

(footnote continues)

ably within reach. Neither condition clearly was met when the EIS was prepared. Sierra-Angoon had not offered a specific, detailed counterproposal that had a chance of success. Those who challenge an EIS bear a responsibility "to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions." *Vermont Yankee,* 435 U.S. at 553, 98 S.Ct. at 1216. Sierra-Angoon did not meet this responsibility. *See Friends of the Earth v. Coleman,* 513 F.2d 295, 298 (9th Cir. 1975) (upholds district court decision that EIS did not have to consider alternative sites as sources of fill, where plaintiffs failed to allege specific evidentiary facts showing that the alternative sites were reasonable and viable); *Seacoast Anti-Pollution League v. Nuclear Regulatory Comm'n,* 598 F.2d 1221, 1231 (1st Cir. 1979) (where petitioners fail to present supporting material, agency need not consider alterna-

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(footnote continued)

Appeals for the District of Columbia Circuit held an EIS inadequate for failing to consider elimination of oil import quotas as an alternative to the sale of general oil and gas leases of tracts on the outer continental shelf. *Id.* at 834-36. The court recognized that this alternative was outside the jurisdiction of the Department of the Interior, which prepared the EIS, and would require the President and Congress to act. But it observed that the lease sale was part of a coordinated plan to deal with the energy crisis, for which plan no programmatic EIS had been prepared. If each agency involved in the plan construed its alternatives narrowly, no EIS would address the environmental consequence of the fundamental policy choices. *Id.* at 835. Furthermore, the Department of the Interior could readily identify the environmental consequences of reducing oil import quotas. *Id.* at 837; *see id.* at 835-836.

In the case before us, the disputed permit is not part of a broader coordinated plan. Nor is the Corps well-placed to identify the environmental consequences of land exchanges and consequent timber harvesting elsewhere. Finally, Congress' decision to grant land on Admiralty Island to Shee Atika is recent, specific, and unlikely to be reversed (absent Shee Atika's consent). "[I]n deciding whether an alternative is reasonable, we may certainly take into account the strength and vitality of legislation that forbids it." *Kilroy v. Ruckelshaus,* 738 F.2d 1448, 1454 (9th Cir. 1984) (EIS need not consider alternative of discharging sewage sludge through ocean outfalls where Congress recently prohibited such disposal); *see Izaak Walton League of Am. v. Marsh,* 655 F.2d 346, 372 (D.C. Cir.) (once Congress authorizes specific dam and lock project, obligation to discuss alternatives is narrow), *cert. denied sub nom. Atchison, T. & S.F. Ry. Co. v. Marsh,* 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981).

tive sites for nuclear power plant). It follows, of course, that Sierra-Angoon has not demonstrated that timber harvesting at an alternative location would be environmentally less harmful than timber harvesting on Admiralty Island.[3] Nor can the Corps make this determination until an exchange becomes ascertainable. Until then, the consequences of an exchange are remote and speculative.

Our position draws support from the fact that since 1979, the federal government has been negotiating with Shee Atika without success for an exchange of the Admiralty Island land. We should not hold a log transfer facility as a hostage to facilitate the resolution of this intractable controversy. Shee Atika's need to benefit economically from ANCSA is urgent. 43 U.S.C. § 1601(b). To defer meeting this need while the Corps considers alternatives that none unilaterally can bring to pass would more resemble coercion than justice. The Corps properly eschewed development of a detailed exchange alternative.

Therefore we conclude that the EIS in issue here was adequate because it discussed all the alternatives that were reasonably necessary to enable the Corps to make an informed decision to grant the log transfer facility permit. We reverse the district court's judgment insofar as it invalidates the permit and enjoins use of the log transfer facility. Because the adequacy of an EIS is a legal question and no issue of material fact remains, we direct summary judgment for Shee Atika-Sealaska on the issue of the validity of the log transfer facility permit.

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[3] In this regard, it is significant that the Sierra Club opposes, on environmental grounds, the federal government's most recent exchange proposal, H.R. 4883.

IV.

CONVEYANCE-FOR-EXCHANGE

Cube Cove was conveyed to Shee Atika and Sealaska by section 506 of ANILCA, 94 Stat. at 2409-12, which provides in relevant part:

> (c)(1) In satisfaction of the rights of the Natives of Sitka, as provided in section 14(h)(3) of the Alaska Native Claims Settlement Act, the Secretary of the Interior, upon passage of this Act, shall convey subject to valid existing rights and any easements designated by the Secretary of Agriculture, the surface estate in the following described lands on Admiralty Island to Shee Atika, Incorporated:
>
> [description of the Cube Cove land].
>
> Concurrently with this conveyance, the Secretary shall convey the subsurface estate in the above described land to Sealaska, Incorporated. As a condition to such conveyances, Shee Atika, Incorporated, shall release any claim to land selections on Admiralty Island other than those lands described in this subsection [and Sealaska shall release any corresponding subsurface rights].
>
> (d) In recognition of the considerable land selection costs incurred by Shee Atika, Incorporated [and two other Native Corporations], in determining the validity of land withdrawals on Admiralty Island under section 14(h)(3) of the Alaska Native Claims Settlement Act, and in identifying suitable lands for exchange outside Admiralty Island, the Secretary of the Interior shall reimburse those corporations for such reasonable and necessary land selection costs, including all costs for negotiating land exchanges, court costs, and reasonable attorney's and consultant's fees, incurred prior to the date of conveyance of such land to such Native Corporations.

Sierra-Angoon assert that the Cube Cove land was conveyed to Shee Atika solely as a bargaining tool for a future exchange with the Department of the Interior for other land, and not for the purpose of timber harvesting at Cube Cove itself.

Sierra-Angoon's only support for this assertion are some ambiguous, off-hand remarks of Senators in the uncorrected transcript of a Senate Committee mark-up session on ANILCA. Markup Session on S.9, Alaska Lands, Transcript of Proceedings, Senate Committee on Energy & Natural Resources, 96th Cong., 1st Sess. 531, 533, 534, 541 (1979). Shee Atika-Sealaska dispute the accuracy of the mark-up comments and offer lengthy and persuasive legislative history indicating that the conveyance was *not* for exchange purposes only. They particularly point out ANILCA § 1302(b), 16 U.S.C. § 3192(b), which provides that "[l]ands located within the boundaries of a conservation system unit which are owned by . . . a Native Corporation or Native Group which has Natives as a majority of its stockholders . . . may not be acquired by the Secretary without the consent of the owner."

Sierra-Angoon's lack of support is telling, because the conveyance-for-exchange is Sierra-Angoon's major argument in the appeal, and many of the other arguments rely on this one. Most of the restrictions on the use of the Cube Cove land that Sierra-Angoon now urge would defeat any other purpose the conveyance might serve. Only if the conveyance was purely for the purpose of a future exchange are these restrictions compatible with it. We refuse to attribute to Congress the purpose to place such restrictions on land-use absent a clear expression of intent. In light of the history and context of section 506(c), we find the conveyance to Shee Atika was not for purpose of exchange only.

Sierra-Angoon argue at length that section 503(d) of ANILCA, 94 Stat. at 2400, should be applied to prevent timber harvesting on the Cube Cove lands. Section 503(d) provides:

> Within the Monuments, the Secretary shall not permit the sale of [sic] harvesting of timber: *Provided,* That

> nothing in this subsection shall prevent the Secretary from taking measures as may be necessary in the control of fire, insects, and disease.

Except for the Cube Cove inholding, Admiralty Island consists entirely of public lands. Sierra-Angoon argue that logging is already prohibited on the *public* lands on Admiralty Island by virtue of sections 503(b), (c), and (f)(1), relying on "common sense" readings of the sections (i.e., the establishment of a Monument, the provision for its protection, and the withdrawal of the land from disposition imply that the land will not be logged). Subsection (d) must therefore apply to the Cube Cove inholding, Sierra-Angoon argue, or the subsection is superfluous. As Shee Atika-Sealaska point out, however, none of the other sections cited prohibits timber harvesting, either expressly or by reference to another statute. *Cf.* 16 U.S.C. § 472a(a) (timber harvesting not per se prohibited in National Monuments).

Sierra-Angoon also argue that their interpretation of section 503(d) is compelled by the "underlying protective purposes" of ANILCA. *See Southeast Alaska Conservation Council, Inc. v. Watson,* 697 F.2d 1305, 1309 (9th Cir. 1983). They cite a number of restrictions on the uses of the public lands on Admiralty Island and argue that allowing Shee Atika unrestricted use of the remainder of the island is anomalous. They also cite a number of restrictions on private land use involving other national preserves and monuments.

All of these are arguments the court considered in *Angoon I,* 749 F.2d at 1415-18.[4] The court considered the legislative history and the purpose of ANILCA and held that reading section 503(d) to prohibit logging on the Cube Cove inholding

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[4] Shee Atika urges us to treat *Angoon I* as law of the case on these issues and others. *Angoon I* was an interlocutory appeal from a preliminary injunction. "As a general rule, decisions on preliminary injunctions do not constitute law of the case and 'parties are free to litigate the merits.' " *Golden State Trans. Corp. v. City of Los Angeles,* 754 F.2d 830, 832 n.3 (9th Cir. 1985) (quoting *City of Anaheim v. Duncan,* 658 F.2d 1326, 1328 n.2 (9th Cir. 1981)), *rev'd on other grounds,* ____U.S.____, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986). We will not depart from our general rule in this case. But our independent consideration of the issues leads us to approve the conclusions reached in *Angoon I.*

would forbid the land's only real economic use and defeat the purpose of section 506(c)'s conveyance of the land. The court therefore concluded that section 503(d)'s prohibition against the harvest of timber "within the Monument[ ]" applied only to *public* lands within the Monument and *not* to Shee Atika's private land. *Id.* at 1418.

Sierra-Angoon appear to raise one new argument that was not addressed by the *Angoon I* panel. They argue that timber harvesting is *not* the only economically feasible use of the Cube Cove land. Sierra-Angoon claim that the Cube Cove land has value that can be realized by exchanging the Cube Cove land for other land that would presumably have more direct utility. Sierra-Angoon note that the government may trade lands of equal or even greater value for the Shee Atika land, *see* ANILCA § 1302(h), 94 Stat. at 2475; ANCSA § 22(f), 43 U.S.C. § 1621(f), and that many Native Corporations have made such exchanges at premiums as high as thirty percent.

This argument is in essence identical to Sierra-Angoon's argument that Congress conveyed the Cube Cove inholding to Shee Atika *solely* for the purpose of a future exchange. If Congress intended the conveyance to confer an economic benefit on Shee Atika and at the same time in section 503(d) prohibited Shee Atika from logging, then Congress must have conveyed the Cube Cove inholding solely for the purpose of exchange. As discussed above with regard to section 506(c) itself, the provision for *voluntary* exchange makes this conclusion unreasonable.

Sierra-Angoon next argue that, even without section 503(d), section 503(c) of ANILCA, 94 Stat. at 2399-400, imposes a duty on the government to mitigate the effects of any timber harvesting on Admiralty Island. Section 503(c) provides:

> Subject to valid existing rights and except as provided in this section, the National Forest Monuments (hereinafter in this section referred to as the "Monuments") shall be managed by the Secretary of Agriculture as units of the National Forest System to protect objects of ecological, cultural, geological, historical, prehistorical, and scientific interest.

Sierra-Angoon cite a number of other specific statutes that impose such duties on the government and court cases that uphold the government's power to perform them. Sierra-Angoon then cite the "irreparable damage to the Monument" that would result from timber harvesting at Cube Cove and conclude that the Secretary is required to mitigate this harm. The court concluded in *Angoon I* that such a reading of section 503(c) would inhibit the only economic benefit of the section 506(c) transfer. This conclusion is still sound and we follow it here.[5]

V.

DURATION OF HARVESTING RESTRICTIONS

Sierra-Angoon also argue that timber harvest on the Cube Cove inholding is subject to section 22(k) of ANCSA, 43 U.S.C. § 1621(k), which provides:

> Any patents to lands under this chapter which are located within the boundaries of a national forest shall contain such conditions as the Secretary deems necessary to assure that:
>
> (1) the sale of any timber from such lands shall, for a period of five years, be subject to the same restrictions relating to the export of timber from the United States as are applicable to national forest lands in Alaska under rules and regulations of the Secretary of Agriculture; and
>
> (2) such lands are managed under the principle of sustained yield and under management practices for protection and enhancement of

[5] Since we find the Secretary had no duty to mitigate the harm caused by the Cube Cove harvesting, we need not decide whether, as the Sierra Club argues, the Secretary should have mitigated that harm by reserving easements in Shee Atika's grant under ANCSA § 17(b), 85 Stat. at 708.

> environmental quality no less stringent than such management practices on adjacent national forest lands for a period of twelve years.

The federal regulations implementing section 22(k) interpret these time limits as running from the date of enactment (Dec. 18, 1971), and thus both time limits have now expired. *See* 43 C.F.R. § 2650.4-5 (1985). Sierra-Angoon argue that the regulation misinterprets the statute. Because the *patent* must contain the conditions, they argue, the plain language of the statute requires that the conditions run from the date of conveyance, not the date of enactment.

We will affirm the Secretary's interpretation of section 22(k) if it is within the range of reasonable meanings of the statute's language and it comports with the statute's purposes. *See Sudomir v. McMahon,* 767 F.2d 1456, 1459 (9th Cir. 1985). Section 22(k) is itself silent about the date from which the time periods are to run, and the remainder of the statute makes Congress' intent no clearer.

Sierra-Angoon cite a number of other provisions of ANCSA that specify time periods that expressly begin on the date of enactment, *e.g.,* sections 2(c), 7(b), 12(c)(3), and 17(d)(2)(B) (43 U.S.C. §§ 1601(c), 1606(b), 1611(c)(3), and 1616(d)(2)(B). They ask the court to infer that, by failing to tie the section 22(k) time periods to the date of enactment, Congress intended that the periods run from the only other plausible date, the date of conveyance. This inference is a weak one at best. Other provisions of ANCSA contain similar ambiguous time limitations. The phrase "for a period of five years" appears in a similar context in section 22(c), 43 U.S.C. § 1621(c), and we have construed that time limitation to run from the date of enactment. *Alaska Miners v. Andrus,* 662 F.2d 577 (9th Cir. 1981). Further, Sierra-Angoon expect a degree of consistency that cannot be presumed in the context of complex legislation such as ANCSA. The substance of section 22(k) appeared for the first time as section 23(v) of S.35 less than two months before final passage of ANCSA, and achieved its present form during a hurried Senate floor debate on the day the Senate passed its version of the bill. 117 Cong. Rec. 38,465-66 (1971). The ambiguity appears to result more from accident than design.

The legislative history is inconclusive. Sierra-Angoon rely on the rejection on the Senate floor of an amendment to the statute that would have explicitly started the time period from the date of enactment. They cite the following exchange:

> Mr. GRAVEL . . . . I wonder if we could dot the "i," and provide the 5 years would run from enactment of this legislation. Would my colleague agree on that point?
>
> Mr. STEVENS. This would make it 5 years. That could be discussed in conference.

117 Cong. Rec. 38,466 (1971) (remarks of Senators Gravel and Stevens). The failure to "dot the 'i'" might at worst reflect a disagreement about the application of section 22(k) that Congress chose to leave to the Secretary to resolve, not a "rejection" of an amendment. *Cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865, 104 S.Ct. 2778, 2793, 81 L.Ed.2d 694 (1984) (Congress can leave to appropriate agency resolution of competing statutory policies). Indeed, subsequent legislative history suggests congressional acquiescence to 43 C.F.R. § 2650.4-5. In considering ANILCA, Congress acknowledged the Secretary's interpretation of section 22(k), but did not see fit to overturn it. The Senate report on ANILCA states that ANCSA "restricts the management of lands conveyed from the national forests to native corporations for 12 years. This 12-year period runs from the date of [ANCSA] through December, 1983." S. Rep. No. 413, 96th Cong., 1st Sess. 261-62 (1979), *reprinted in* 1980 U.S. Code Cong. & Admin. News 5070, 5205-06.

The Secretary has the principal responsibility for administering ANCSA and his interpretation is entitled to deference. *Doyon Ltd. v. Bristol Bay Native Corp.*, 569 F.2d 491, 496 (9th Cir.), *cert. denied*, 439 U.S. 954, 99 S.Ct. 352, 58 L.Ed.2d 345 (1978). Sierra-Angoon urge us not to defer to the Secretary's interpretation because, they argue, the agency has not held a consistent view of the statute. *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944). They note that two proposed versions of 43 C.F.R. § 2650.4-5 measured the section 22(k) time periods from the date of

conveyance, *see* 38 Fed. Reg. 6505-06 (1973); 37 Fed. Reg. 19,636 (1972), while the final regulation adopted time periods from the date of enactment without explaining the change. But the inconsistency the courts have frowned upon is in *official* interpretations. To hold a final interpretation must be consistent with draft regulations would deprive the rulemaking process of flexibility, transforming proposed regulations into official actions that agencies would be hesitant to reconsider. *See International Harvester Co. v. Ruckelshaus,* 478 F.2d 615, 632 (D.C. Cir. 1973).

The Secretary's interpretation is entitled to great deference as a "longstanding contemporaneous administrative construction," upon which interested persons are likely to have relied. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 120, 100 S.Ct. 2051, 2062, 64 L.Ed.2d 766 (1980). Native corporations that built facilities to service the "round log" export market using timber from lands conveyed to them under ANCSA may have relied upon 43 C.F.R. § 2650.4-5 for assurances that their exports would be free of restriction. If we were to read the section 22(k)(1) export restrictions as still operative today, their investments could be impaired.

Sierra-Angoon urge us not to defer to the agency because the interpretation issue requires no agency expertise. We disagree. The Secretary's interpretation of section 22(k) involved a reconciliation of competing policies that entailed "more than ordinary knowledge" of the regulated matters. *Chevron U.S.A.,* 467 U.S. at 844, 104 S.Ct at 2783 (quoting *United States V. Shimer,* 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961). Congress intended ANCSA and section 22(k) to accomplish several competing goals, including: (1) to create viable, profitable Native Corporations, *see Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp.,* 517 F. Supp. 1255, 1262 (D. Alaska 1981); (2) to prevent "haphazard and disjointed management" of forest lands until the Native Corporations could develop their own management plans to govern the tracts they selected, S. Rep. No. 405, 92d Cong., 1st Sess. 164 (1971); (3) to prevent the Native Corporations from immediately selling off their resources to raise

capital the government would be providing them over the ensuing ten years anyway, *see* 117 Cong. Rec. 46,965 (1971) (remarks of Sen. Stevens); and (4) to cushion the blow to local sawmills that relied on export restrictions applicable to timber taken from Forest Service lands.

The Secretary's interpretation furthered the creation of profitable Native Corporations by lifting export restrictions at an early date. It also limited "haphazard and disjointed management" by setting a date certain for the expiration of the time limits. Starting the time running from the date of conveyance would result in a confusing, staggered set of limits, especially for Native Corporations (such as Sealaska) that have received different parcels at different times. It limited Native exploitation of the lands for five years, the time period intended to be required for federal distribution of the majority of the money settlements; *see* ANCSA § 6(a), 43 U.S.C. § 1605(a). And it gave the local timber industry breathing space during a limited transitional period to prepare for the relaxation of import restrictions. The Secretary's interpretation should not be disturbed unless it is unreasonable. *See Chevron U.S.A.*, 467 U.S. at 844, 104 S.Ct. at 2782. We find it to be consistent with both the statute's policies and its literal language.

VI.

SUBSISTENCE RIGHTS

Sierra-Angoon assert that section 810 of ANILCA, 16 U.S.C. § 3120, requires "subsistence evaluations" of various government actions: the Secretary's conveyance of Cube Cove to Shee Atika under section 506(c) of ANILCA; the issuance of permits by the EPA and Corps for the log transfer facility under sections 402 and 404 of the Clean Water Act, 33 U.S.C. §§ 1342 and 1344; the Bureau of Indian Affairs' loan to Shee Atika; and the Forest Service's "duty" pursuant to ANILCA § 503(c) and ANCSA § 22(k) to protect the monument lands. Section 810(a) provides in relevant part:

> In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of

> public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

As the language indicates, this provision affects agency determination of "whether to lease or otherwise permit the disposition of public lands." *Village of Gambell v. Clark*, 746 F.2d 572, 579 (9th Cir. 1984). The district court concluded that the government had taken no action affecting "public lands" and that section 810(a) was therefore inapplicable.

Sierra-Angoon argue that the spillover effect of the private use of Cube Cove on the subsistence use of the public lands on the rest of Admiralty Island brings the government's actions within section 810(a). The government's actions, they argue, make the logging operation both possible (the conveyance) and economically feasible (the log transfer facility permit, the loan), and the logging operation in turn affects the public lands of the monument. Sierra-Angoon urge the court to read section 810 broadly, *see Gambell*, 746 F.2d at 581, and to focus on the actual effects on public lands of the government actions authorizing use of private lands. *Cf. Adler v. Lewis*, 675 F.2d 1085, 1091-92 (9th Cir. 1982) (under 49 U.S.C. § 1653(f), highway construction activities that significantly adversely affect public park lands "use" the park lands).[6]

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[6] Sierra-Angoon also argue that the EPA's and Corps' granting of permits under sections 402 and 404 of the Clean Water Act, 33 U.S.C. §§ 1342 and 1344, required a section 810 subsistence evaluation because these determinations used "public land": namely, a navigational servitude. "Public land" is defined to include all interests in land in which the United States holds title. ANILCA § 102(1)-(2), 16 U.S.C. § 3102(1)-(2). Since the United States does not hold title to the navigational servitude, the servitude is not "public land" within the meaning of ANILCA. *See United States v.*

(footnote continues)

Even if we were to read "public lands" this broadly, however, subsistence evaluations would not be required here for several reasons. First, none of the agencies Sierra-Angoon cite has "primary jurisdiction" over the public lands used for subsistence, as required by section 810. Second, the agency that does have such jurisdiction, the Department of Agriculture, has taken no action regarding the Cube Cove land that would invoke section 810. *Cf. Alaska v. Andrus,* 591 F.2d 537, 540 (9th Cir. 1979) (inaction insufficient to require an EIS under NEPA). In addition, other provisions of ANILCA tend to belie the applicability of section 810 to private lands. *E.g.,* ANILCA § 802(3), 16 U.S.C. § 3112(3) ("Federal land managing agencies . . . shall cooperate with adjacent landowners and land managers, including Native Corporations . . . ."); *id.* § 810(d), 16 U.S.C. § 3120(d) ("After compliance . . . , the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction . . . .").

It seems likely that, as Sierra-Angoon argue, a subsistence evaluation of the government's Cube Cove actions would be beneficial and consistent with the purpose of ANILCA. The plain language of the statute, however, cannot fairly be read to require such an evaluation for actions regarding private lands. Sierra-Angoon argue strenuously that they are not advocating regulating private lands but only spillover "use" of public land. This seems a distinction without a difference. We affirm the district court's holding that section 810 is inapplicable to Shee Atika's use of Cube Cove.

(footnote continued)

Virginia Elec. & Power Co., 365 U.S. 624, 627-28, 81 S.Ct. 784, 787-88, 5 L.Ed.2d 838 (1961) (servitude is "power of government to control and regulate navigable waters in the interest of commerce") (quoting *United States v. Commodore Park,* 324 U.S. 386, 390, 65 S.Ct. 803, 805, 89 L.Ed 1017 (1945)). For similar reasons, the Secretary was not required to perform a section 810 evaluation prior to transferring the Cube Cove lands to Shee Atika. Cube Cove is simply not "public land." *See* ANILCA §§ 102(3)(B) and 810(c), 16 U.S.C. §§ 3102(3)(B) and 3120(c).

Sierra-Angoon also claim that Shee Atika's activities will violate the Angoon residents' rights to continued subsistence uses of Admiralty Island under section 506(a)(2) of ANILCA, 94 Stat. at 2407. Section 506(a)(2) provides:

> Nothing in this section shall affect the continuation of the opportunity for subsistence uses by residents of Admiralty Island, consistent with title VIII [ANILCA §§ 801-816, 16 U.S.C. §§ 3111-3126] of this Act.

The district court found that section 506(a)(2) did not apply to the conveyance to Shee Atika under section 506(c). We agree. As used in the statute, "this section" refers only to section 506(a), which granted other Admiralty Island lands to a different Native Corporation, Kootznoowoo, Incorporated, and not to the whole of section 506, which includes the grant to Shee Atika. Each of subsections (a), (b), and (c) of section 506 involves a separate Native Corporation and is independent of the others. Subsection 506(a)(2) is placed between two other provisions, subsections 506(a)(1) and 506(a)(3), that exclusively concern the Kootznoowoo grant. We conclude that Congress intended subsection 506(a)(2) to apply only to the Kootznoowoo grant.

Sierra-Angoon argue that "this section" is the whole of section 506 and that the restrictions of 506(a)(2) are compatible with the conveyance to Shee Atika because the land was conveyed for the purpose of exchange (discussed *supra*, section IV). They also argue that section 506(a)(2) would be superfluous if it did not apply to the Shee Atika inholding because Angoon's subsistence use of public lands is already protected by sections 503(b), (c), and (f)(1), and title VIII. Under our view that "this section" is only section 506(a), however, the provision has meaning and yet does not affect the Shee Atika conveyance.

In a similar vein, Sierra-Angoon argue that the protections of section 506(a)(2) must be broader than those of title VIII or the former is superfluous. However, Congress probably included the phrase "consistent with title VIII" to ensure section 506(a) did not undermine title VIII, not to provide broader protections.

Sierra-Angoon also assert that the Secretary breached his duty under ANILCA § 811, 16 U.S.C. § 3121, to guarantee residents of Angoon access to their subsistence lands. Section 811(a) provides:

> The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.

Sierra-Angoon assert that the Angoon residents' traditional use of Cube Cove as a point of access to the other public lands in the Monument requires the Secretary to restrict Shee Atika's logging, road building, and other projects in Cube Cove to accommodate that use. Although Shee Atika's activities may have some of the effects Sierra-Angoon assert, the language of section 811(a) must be stretched a long way to allow—much less require—the Secretary to restrict the use of *private* land to assure access to subsistence resources on public lands. We affirm the district court's grant of summary judgment on this issue.

VII.

CONCLUSION

In light of ANILCA's grant of Cube Cove to Shee Atika, the 1982 legislation confirming it, and the 1986 legislation recognizing it, we hold Congress intended Shee Atika to have the opportunity to harvest timber on the Cube Cove land and not merely to be able to exchange it for another parcel. We reverse the district court's judgment invalidating the permit for the construction and operation of the log transfer facility and enjoining use of the facility. We affirm in all other respects.

REVERSED IN PART AND AFFIRMED IN PART.

APPENDIX B

United States Court of Appeals

FOR THE NINTH CIRCUIT

85-4413
86-3582
86-3617
NO. 86-3618
CV-83-234-JAVDH

CITY OF ANGOON, *et al.*,
Plaintiffs-Appellees,

VS.

DONALD HODEL, *et al.*,
Defendants-Appellants

APPEAL from the United States District Court for the _____ District of _____.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ANCHORAGE District of ALASKA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is, REVERSED IN PART AND AFFIRMED IN PART.

cc: L. Gordon
D. Zaelke
B. Landon
J. Luke
J. Tillinghast
Judge von der Heydt

Filed and entered 10/31/86

APPENDIX C

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 85-4413, 86-3582
86-3617, 86-3618

ORDER

CITY OF ANGOON, THE SIERRA CLUB,
THE WILDERNESS SOCIETY, *et al.*,
Plaintiff's-Appellees,

v.

DONALD HODEL, Secretary of the Interior, *et al.*,
Defendants,

and

SHEE ATIKA, Inc.,
Defendant-Appellant,

and

SEALASKA CORP.,
Defendant-Appellant.

Before: SNEED, KENNEDY, and WIGGINS, Circuit Judges

Appellees Sierra Club/Angoon's petition for rehearing is denied. The mandate shall issue forthwith.

Dated: December 1, 1986

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

Civil Action No. A83-234 Civ

CITY OF ANGOON, *et al.*,
Plaintiff,

v.

DONALD P. HODEL, Secretary of the Department of Interior, *et al.*,
Defendants.

MEMORANDUM AND ORDER ON REMAINING ISSUES RAISED IN CONSOLIDATED COMPLAINT

THIS CAUSE comes before the court on the motions and briefing of the parties directed to the following issues raised in the Consolidated Complaint dated April 29, 1985:

(1) alleged violations of § 17(b) of the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (1971);

(2) alleged violations of the Property Clause of the United States Constitution;

(3) alleged violations of the Due Process Clause of the United States Constitution;

(4) alleged violations of §§ 306, 402 and 404 of the Clean Water Act (CWA), Pub. L. No. 92-500, 86 Stat. 816 (1972);

(5) alleged violations of the National Environmental Policy Act (NEPA) §§ 101 and 102, Pub. L. No. 91-190, 83 Stat. 852 (1970).

Previous memoranda have addressed the subsistence, trust responsibility, and ANCSA § 22(k) issues raised by this litigation.

1. ANCSA Section 17(b)

All three counts of the consolidated complaint allege violations of ANCSA § 17(b); plaintiffs therefore assert that the conveyance, the permits for timber operations, and the timber operations themselves violate the section. Plaintiffs concede in their brief that in regard to the Shee Atika conveyance § 17(b) must be read in conjunction with § 506(c) of ANILCA. The relevant portions of these statutes are set out below.

Section 17(a)(1) of ANCSA established the Joint Federal-State Land Use Planning Commission for Alaska. Section 17(b)(1) required the Commission to

> identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.

Section 17(b)(3) provided:

> Prior to granting any patent under this Act to the Village Corporation and Regional Corporations, the Secretary shall consult with the State and the Planning Commission and shall reserve such public easements as he determines are necessary.

Pursuant to subsection (a)(10), as amended, the life of the Commission expired in 1979. Accordingly, Congress included in the ANILCA provision authorizing the Shee Atika conveyance an instruction as to how the § 17(b) easements were to be identified and protected:

> In the instrument of conveyance provided for in paragraph (1), the Secretary of the Interior shall

> reserve such easements as are described in section 17(b)(1) of the Alaska Native Claims Settlement Act, *as the Secretary of Agriculture may designate* for public access to and utilization of the adjacent Federal lands.

ANILCA § 506(c)(2) (emphasis added). Finally, § 506(c)(1) described in the Cube Cove lands and provided that

> the Secretary of the Interior . . . *shall convey subject to* valid existing rights and *any easements designated by the Secretary of Agriculture,* the surface estate in the . . . described lands on Admiralty Island to Shee Atika, Incorporated

(emphasis added).

Prior to ANILCA, the Secretary of the Interior had authority, pursuant to ANCSA § 17(b)(3), to make decisions regarding easements after consulting with the Commission and the State. It would have been possible for the Secretary to abuse his discretion in exercising this delegated authority. ANILCA altered the ANCSA procedure in several respects in connection with the Shee Atika conveyance. First, it transferred consideration of the matters listed in ANCSA § 17(b)(1) from the now-defunct Commission to the Secretary of Agriculture. Second, it vested the Secretary of Agriculture with decision-making authority, rather than with the merely advisory role the Commission had occupied. Instead of evaluating § 17(b)(1) recommendations submitted by the Commission, the Secretary of the Interior was now given the purely ministerial duty of incorporating in the conveyance any easement designated by the Secretary of Agriculture. Moreover, the Secretary of the Interior did not retain independent authority under § 17(b)(3) to reserve easements in addition to those designated by the Secretary of Agriculture. ANILCA § 506(a)(1) mandated the conveyance that the Secretary of the Interior was to make, and subjected that conveyance to no easements other than those identified by the Secretary of Agriculture.[1] Of course, the

[1] Plaintiffs do not maintain, and apparently could not maintain, that any of the easements they advocate could be characterized as "valid existing rights" preserved under § 506(c)(1).

Secretary of the Interior "can reserve only what Congress authorizes him to reserve." *Leo Sheep Co. v. United States,* 570 F.2d 881, 888 (10th Cir. 1977), *rev'd on other grounds,* 440 U.S. 668 (1979); *accord, e.g., Burke v. Southern Pacific R.R.,* 234 U.S. 665, 699 (1914).

In short, the task of selecting easements for the Shee Atika conveyance rested entirely with the Secretary of Agriculture. No doubt the Secretary of Agriculture was obliged to select the easements in compliance with any applicable provisions of ANCSA and ANILCA, and it is conceivable that he failed to do so.[2] Plaintiffs' remedy for any such failure, however, was through an administrative appeal pursuant to 36 C.F.R. § 211.18 (formerly 36 C.F.R. § 211.19). Having failed to file such an administrative appeal, plaintiffs may not now challenge the selections of the Secretary of Agriculture.[3]

Because they have not exhausted their administrative remedies, Plaintiffs cannot maintain any of their three causes of action under § 17(b) with respect to the Secretary of Agriculture. Moreover, since the Secretary of Agriculture did not select any easement inconsistent with the Clean Water Act permits for the log transfer facility, the § 17(b) portion of the plaintiffs' second claim must fail as to all defendants.

Review of the ministerial duty of the Secretary of the Interior is properly before this court. The court has examined the uncontroverted evidence of the Secretary of Agriculture's selection and the Secretary of the Interior's conveyance. Each of the fourteen trail easements and seven site easements has been incorporated into the conveyance. Federal Defendants' Exhibit HH; Shee Atika Motion to Dismiss at A-3 to A-6, A-11

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[2] After public hearings in Juneau and Angoon, the Secretary of Agriculture selected fourteen 25-foot-wide trail easements with an aggregate length of approximately ten miles, and seven one-acre cabin or campsite easements. Federal Defendants' Exhibit HH. The Cube Cove conveyance totals about 36 square miles.

[3] The court observes that the Regional Forester was under the mistaken impression that the selections were advisory. Federal Defendants' Exhibit HH, attached Environmental Assessment at page 1. Had the Department of Agriculture held to this view, administrative appeal would have been denied. 36 C.F.R. § 211.18(b)(3). Plaintiffs were nonetheless obliged to attempt the appeal.

to A-12. Accordingly, all defendants are entitled to summary judgment on the § 17(b) claims. *See Ybarra v. Reno Thunderbird Mobile Home Village,* 723 F.2d 675, 677 (9th Cir. 1984).

II. Property Clause

Plaintiffs allege that the permits for timber operations and the timber operations themselves "violate" Article IV, Section 3, Clause 2 of the Constitution, which reads:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

This clause is a grant of legislative authority. It does not create rights or duties that could be violated. In their briefs, plaintiffs explain that they allege violations of statutes enacted pursuant to the Property Clause. Any such violations are violations of those statutes, however; they are not violations of this Constitutional provision. Plaintiffs' allegations pursuant to the Property Clause fail to state a claim upon which relief can be granted.

III. Due Process Clause

The consolidated complaint alleges that the conveyance is invalid because the Secretary's procedures leading to its issuance violated plaintiffs' right to due process. Whatever the merits of this allegation as an original matter, it was mooted by § 315 of the Interior Appropriations Act of 1983, P.L. No. 97-394, 96 Stat. 1966, 1998 (Dec. 30, 1982), which provides:

> The titles conveyed by and the easements and restrictions heretofore reserved and imposed by the Secretary of the Interior pursuant to section 506(c) of Public Law 96-487 are hereby confirmed in all respects: *Provided,* That nothing herein shall be deemed to amend the Alaska National Interest Lands Conservation Act or the Alaska Native Claims Settlement Act.

Congress has unlimited power under Article 4, Section 3, Clause 2 of the Constitution to dispose of public lands as it sees fit. *United States v. City and County of San Francisco,* 310 U.S. 16, 29-30 (1940); *Kidd v. Dep't of Interior, Bureau of Land Management,* 756 F.2d 1410, 1411-12 (9th Cir. 1985). If the conveyance was defective owing to due process violations by the Secretary of the Interior, then the Cube Cove lands remained public lands when § 315 was enacted and Congress used its plenary authority at that time to convey the lands to Shee Atika under the terms of the Secretary's conveyance.[4] *See Tameling v. United States Freehold and Emigration Co.,* 93 U.S. 644, 663 (1876) (confirmatory act "passes the title of the United States as effectually as if it contained in terms a grant *de novo*").

IV. Clean Water Act

The consolidated complaint alleges that the permits for timber operations and the timber operations themselves violate §§ 402 and 404 of the CWA. It also alleges that the timber operations themselves violate § 306 of the Act. Defendants urge dismissal of all of these claims.

Section 306 prohibits violations of effluent standards for new pollution sources. The single § 306 allegation in the consolidated complaint is wholly conclusory; the complaint simply states that "[t]he timber operations . . . violate . . . [section] 306 . . . of the CWA." No facts are alleged that would constitute such a violation, and none have been provided in subsequent briefing. This conclusory allegation fails to provide the fair notice of the nature of claim asserted that is required under F. R. Civ. P. 8(a)(2). *See, e.g., Jones v. Community Redevelopment Agency of Los Angeles,* 733 F.2d 646, 649 (9th Cir. 1984); *Mountain View Pharmacy v. Abbott Laboratories,* 630 F.2d 1383, 1386-87 (10th Cir. 1980).

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[4] Of course, Congress did not thereby "override" or "amend" the due process clause; it simply conveyed the lands in a manner that mooted any prior due process violations by the Secretary.

Because of the concluding proviso added to § 315 in conference, the court does not believe § 315 was intended to moot challenges to the conveyance arising out of ANILCA and ANCSA.

The court declines to dismiss the remainder of plaintiffs' Clean Water Act claims at this time. The § 402 claims grow out of Shee Atika's failure to obtain a National Pollutant Discharge Elimination System (NPDES) permit for its log transfer operations. This court ordered Shee Atika to obtain such a permit on April 10, 1984 (Case No. A84-126). Shee Atika received its NPDES permit on June 3, 1985, but the permit is presently the subject of an appeal. *See* Status Report of Shee Atika filed October 25, 1985 (Docket Nos. 162 and 163). Accordingly, the court will retain jurisdiction over the § 402 claims. The § 404 claims are discussed below in conjunction with the related NEPA claims. *See* Part V, *infra.*

V. Nepa Sections 101 and 102

Initially, the court may quickly dispose of plaintiffs' claim that the Cube Cove conveyance violated NEPA because it was not preceded by an Environmental Impact Statement. Section 910 of ANILCA provides:

> The National Environmental Policy Act of 1969 (83 Stat. 852) shall not be construed, in whole or in part, as requiring the preparation or submission of an environmental impact statement for withdrawals, conveyances, regulations, orders, easement determinations, or other actions which lead to the issuance of conveyances to Natives or Native Corporations, pursuant to the Alaska Native Claims Settlement Act, or this Act.

Hence NEPA has no application to the Cube Cove conveyance.

NEPA likewise has no direct application to Shee Atika's private timber operations on the Cube Cove lands; these operations are not federal actions. The NEPA aspect of plaintiffs' second and third claims may therefore be distilled to the following pair of allegations: that the Section 404 permit for the log transfer facility (LTF) was issued without compliance with NEPA, and that as a result the log transfer portion of Shee Atika's timber operation may not proceed. The parties have cross-moved for summary judgment on these allegations. For the reasons explored below, the court grants summary judgment to plaintiffs and voids the Section 404 permit.

The Section 404 permit at issue was granted in its present form in February, 1985. Preparatory to granting the permit, the Army Corps of Engineers published an environmental impact statement (EIS). Plaintiffs contend that the EIS is inadequate because it fails to consider, pursuant to NEPA § 102(2)(c)(iii), the possibility that as an alternative to building the log transfer facility Shee Atika could exchange its lands for other federal timberlands not on Admiralty Island. Such exchanges are envisioned by ANCSA and ANILCA, and in Shee Atika's case would accord with a Congressional hope that Shee Atika would exchange the Cube Cove lands granted it in ANILCA. *See* this court's Order regarding subsistence issues, October 17, 1985.

For convenience, the court will adopt the convention of the parties to refer to this option as the "exchange alternative." The exchange alternative can be conceived in two ways. It can be viewed as a branch of the "no action alternative"—the possibility that the Corps could issue no permit at all. On this view the alleged defect of the EIS is that its consideration of the no action alternative is inadequate, failing to evaluate it from the standpoint of promoting an off-island exchange. *See* 33 C.F.R. Part 230, App. b, ¶ 11b(5)(i) (1985); *cf. Kilroy v. Ruckelshaus,* 738 F.2d 1448, 1453-54 (9th Cir. 1984). Alternatively, exchange can be viewed as a separate alternative in its own right, one available to the applicant but outside the jurisdiction of the Corps. Failure to consider a reasonable alternative of this nature would likewise render the EIS defective. 33 C.F.R. Part 230, App. B, ¶ 11b(5)(i) (1985); 40 C.F.R. § 1502.14(c) (1985).

A. Required Scope of EIS Treatment of Alternatives

The parties do not dispute that the law requires a broad definition of the applicant's project and a broad and generic definition of the purpose of that project. The Corps' regulations governing the preparation of Environmental Impact Statements provide that

> every application has both an applicant's purpose and need and a public purpose and need. These may be the same when the applicant is a governmental body

> or agency. In most instances when an EIS is required and the applicant is not a governmental body or agency, the applicant is a member of the private sector engaged in providing a good or service for profit. At the same time, the applicant is requesting a permit to perform work which, if approved, is considered in the public interest (i.e., provides a public benefit). This public benefit shall be stated in as broad, generic terms as possible. For instance, the need for a water intake structure requiring a Corps permit as part of a fossil fuel power plant shall be stated as the need for energy and not be limited to the need for cooling water. In a similar way, the need for housing near canals or near marinas, etc., shall be expressed as the need for shelter and not as the need for recreation near water.

33 C.F.R. Part 230, App. B, § 11(b)(4) (1985). Applying these principles to the instant case, the purpose of Shee Atika's application is commercial timber harvesting.

The parties likewise do not dispute that the consideration of alternatives pursuant to NEPA § 102(2)(C)(iii) must be addressed to this broad purpose. *See* 33 C.F.R. Part 230, App. B, ¶ 11b(5)(b) (1985). Hence it would be improper to consider only alternative means of moving logs out of Cube Cove, if another alternative not involving the movement of logs from Cube Cove would also enable commercial timber harvesting to go forward.

The EIS declares that the exchange alternative "cannot be considered in detail" because "the possibility of an exchange is remote and speculative." EIS at 2-4. This ground likewise forms the core of defendants' argument in this litigation. Remote and speculative alternatives need not be considered in an EIS. *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519, 551 (1978). Conversely, failure to consider a reasonable alternative renders an EIS inadequate. *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051 (9th Cir. 1985).

Summary judgment may be granted if it appears from the record of the case, after viewing all factual inferences in the light most favorable to the non-moving party, that no genuine

issues of material fact exist, and that the moving party is entitled to prevail as a matter of law. *International Ladies Garment Workers Union v. Sureck*, 681 F.2d 624, 629 (9th Cir. 1982). The moving party has the burden to show that no genuine issue of material fact exists. *Ron Tonkin Grand Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1381 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981). As will be seen, the relevant facts are not in dispute in the instant case, and the legal defenses interposed by defendants are without merit.

B. Defendants' Argument Regarding Consent

Defendants claim that exchange is remote and speculative because Shee Atika has refused all exchange proposals advanced by the Forest Service, and that since Shee Atika might refuse future proposals the alternative is "inherently speculative." It is true, of course, that no exchange could go forward without Shee Atika's consent. But Corps regulations call for the consideration of such alternatives. 33 C.F.R. Part 230, App. B, ¶ 11b(5)(b) (1985). Indeed, virtually no alternative considered in a permit EIS of this type could be accomplished without the applicant's consent. Whenever the Corps deems an alternative preferable to a proposed action and declines to issue or modifies the permit on that basis, the applicant has the option of abandoning its project in preference to adopting the alternative. Not infrequently, it also has an option of proceeding with the project but bypassing the procedure requiring a permit. Alternatives 2, 4, 5 and 6 considered in the Cube Cove EIS fall into this latter category; in each case, had the Corps fixed on one of these alternatives as preferable to the proposed action, Shee Atika could have refused to adopt the alternative and could instead have conducted commercial timber operations by means of helicopter transfer. With respect to the need for the applicant's consent, the exchange alternative is exactly like Alternatives 2, 4, 5, and 6: Shee Atika would have the options of adopting the alternative, abandoning its project, or proceeding with an LTF.[5]

[5] The record does not establish whether commercially viable timber operations could proceed indefinitely without an LTF. Defendants and the EIS concede that denial of the permit would increase economic pressure for an exchange.

The question to be asked, however, is simply whether an off-island exchange is "reasonable." *Better Henderson, supra,* 768 F.2d at 1057. If the exchange alternative is objectively reasonable, it is not remote and speculative; Shee Atika cannot render an objectively reasonable alternative remote and speculative simply by refusing to adopt it. *See Friends of the River v. F.E.R.C.,* 720 F.2d 93, 108 (D.C. Cir. 1983) (courts do not waive requirement of serious environmental decision-making merely "on the ground that such an enterprise would not change the party's mind").

C. Alleged Need for Legislative Authorization for Exchange

Defendants argue that the exchange alternative is remote and speculative because it might require legislative approval for implementation. As more fully explained in Subpart E, however, the court interprets ANILCA § 1302(h) to authorize an exchange that would entail little or no legislative involvement. Moreover, "[t]he mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion." *N.R.D.C. v. Morton,* 458 F.2d 827, 837 (D.C. Cir. 1972); *accord, e.g., Kilroy v. Ruckelshaus,* 738 F.2d 1448, 1454 (9th Cir. 1984); *Coalition for Responsible Regional Development v. Brinegar,* 518 F.2d 522, 527 n.4 (4th Cir. 1975). This is because an EIS is intended to inform a broad spectrum of decisionmakers, including those at the legislative level. *N.R.D.C. v. Morton, supra,* 458 F.2d at 833, 837. While NEPA does not mandate consideration of alternatives that would entail repeal of basic legislation such as the antitrust laws, *id.* at 837, or the Clean Water Act, *Kilroy, supra,* 738 F.2d at 1453-54, reasonable alternatives involving minor legislative adjustment or approval are within the compass of the EIS process. The boundary adjustments or funding appropriations that might involve Congress in an off-island exchange are in the latter category. *See generally Sierra Club v. Froehlke,* 359 F. Supp. 1289, 1338-39 (S.D. Tex. 1973).

D. Consideration of Matters Beyond Corps' Jurisdiction

Defendants apparently suggest that the exchange alternative is remote and speculative because it entails action by Federal agencies other than the Corps. This argument is meritless. *See, e.g.,* 33 C.F.R. Part 230, App. B., ¶ 11b(5)(b)(iv); 40 C.F.R. § 1502.14(c).

E. Availability of Lands for Exchange

Defendants also aver that the exchange alternative is remote and speculative because no land is available in Southeast Alaska for an exchange. While this reasoning is not advanced in the EIS, the court will consider it on the assumption that, if valid, it could establish that the EIS is not materially deficient.

To show that in the 16,815,000 acres of Tongass National Forest insufficient land is available to exchange for Shee Atika's 23,000-acre holding, defendants rely principally upon an unelaborated statement by the Chief of the Forest Service to a Senate committee that "there are no unallocated lands available." Hearing Before Senate Select Comm. on Indian Affairs on An Inquiry With the Affairs of Shee Atika, Inc., 98th Cong., 1st Sess. at 294-95 (1983) (testimony of R. Max Peterson). Mr. Peterson did not indicate the nature of the allocation, nor that it is irrevocable. The court need not decide whether this feeble showing could establish a material issue of fact with respect to the availability of comparable lands for exchange.[6] Defendants' argument is based on a non sequitur: that if no comparable tract can be found for exchange, the exchange

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[6] Mr. Peterson's reference to allocation was presumably a reference to prior administrative or legislative allocation. As was shown in Subpart C, *supra,* alternatives that involve adjustments to existing legal structures are not beyond the scope of an EIS. Moreover, it is undisputed that other Native corporations have successfully exchanged their Admiralty Island holdings; Gold Belt exchanged the very lands Shee Atika how holds. ANILCA §§ 506(a)(3), 506(b). Finally, substantial evidence indicates that off-island lands may still be readily available for exchange. *See* Tongass Land Management Plan, Appendix 2 (Exhibit 4 to plaintiffs' cross-motion, Docket Nos. 117 and 142); Draft ANILCA § 706(b) Report No. 1 at 10, Table 5 (July 19, 1985) (Supplemental Exhibit filed as Docket No. 149) (indicating that Forest Service continues to reserve 9,000,000 board feet of annual timber volume in anticipation of possible exchange with Shee Atika).

alternative is remote and speculative. The conclusion does not follow the premise because the Secretary of Agriculture is authorized to offer cash as well as land in proposing an exchange to a Native corporation. ANILCA § 1302(h). Even if no comparable and exchangeable lands could be found, therefore, a cash-for-land or cash-and-land-for-land exchange would be possible.

Defendants argue that § 1302(h) does not cover the Cube Cove lands because those lands are within a National Forest Wilderness, and therefore are excluded from the general exchange authority granted in ANILCA § 1302(a). Section § 1302(h), however, begins with the phrase "Notwithstanding any other provision of law." It then grants a broader exchange authority than does § 1302(a) with respect to certain enumerated landholders. If the § 1302(a) restriction were applied to § 1302(h), the entire first sentence of § 1302(h) would become surplus language, a consequence to be avoided in statutory construction. *Tabor v. Ulloa,* 323 F.2d 823, 824 (9th Cir. 1963). For further evidence of Congressional intent regarding the exchangeability of Shee Atika's 23,000-acre holding, *see* ANILCA § 103(b), (c).

F. Alleged Impropriety of Denying Permit on Ground that Exchange is Preferable

The EIS declares that "[d]enying a permit . . . for the sole purpose of forcing Shee Atika to accept exchange proposals it would otherwise refuse cannot be deemed a proper alternative." EIS at 2-4. Defendants' briefs echo this position, although neither the EIS nor the briefs articulates a rationale for it. If an objectively reasonable exchange were offered, but Shee Atika nonetheless refused to consent to it, it would not be improper for the Corps to deny a permit, pursuant to its authority under 33 U.S.C. § 1344(c). The Corps is obligated to consider the public interest in evaluating a permit application, and is entitled to deny a permit that would be contrary to the public interest. 33 C.F.R. § 320.4(a); *see also e.g., Buttrey v. United States,* 690 F.2d 1170, 1183-86 (5th Cir. 1982), *cert. denied,* 461 U.S. 927 (1983). The point of the EIS process, of course, is to ascertain the public interest. If evaluation showed

that an exchange would better serve environmental and other public values while protecting Shee Atika's commercial interests, denial of a permit would promote the public interest by encouraging (though not compelling) the exchange. The Corps is under no obligation to assist an applicant in pursuing an unnecessarily damaging means of accomplishing its goal. Because it would be proper for the Corps to deny a permit on the basis that a fair off-island exchange would better serve the public interest, it would be proper for the Corps to evaluate an off-island exchange as an alternative in the EIS.[7]

G. Plaintiffs' Right to Summary Judgment

In the EIS process, the "agency bears the primary responsibility to investigate serious alternatives." *Seacoast Anti-Pollution League v. N.R.C.*, 598 F.2d 1221, 1231 (1st Cir. 1979). Plaintiffs met their minimal burden of suggesting the exchange alternative during the comment period (indeed, in light of past exchanges the alternative may have been sufficiently obvious that the Corps was obligated to raise it on its own.) It was then up to the Corps to decide whether or not the proposal was reasonable, and to dispose of it accordingly.

Plaintiffs' burden in this litigation is to show, under the "hard look" standard applicable to an EIS, that the Corps' determination that exchange is remote and speculative is an erroneous determination. *See e.g., Texas Committee on Natural Resources v. Marsh*, 741 F.2d 823, 824 (5th Cir. 1984). To do so, they need not prove that exchange is the best alternative. *E.g., Better Henderson, supra*, 768 F.2d at 1057. They must show only that exchange is possible and that it is not remote and speculative. Exchange in this context is inherently possible because even if sufficient lands are unavailable for exchange the

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[7] Because the purpose of this EIS is to foster informed discussion and decisionmaking by persons other than the Corps—including Shee Atika, the public, the Forest Service, and Congress—it is arguable that the EIS should include an evaluation of off-island exchange even if for some reason it were not proper for the Corps itself to deny a permit on the ground that exchange is preferable. *See, e.g., Better Henderson, supra*, 768 F.2d at 1056; *N.R.D.C. v. Morton, supra*, 458 F.2d at 833; *see also* 33 C.F.R. Part 230, App. B, ¶ 11b(5)(b)(ii) (1985).

government is able to substitute money for land in an exchange proposal. The undisputed fact that other Native corporations have exchanged the same or similar tracts establishes that an exchange is not a remote and speculative idea. The EIS therefore should have evaluated the merits of the exchange alternative.

Accordingly, IT IS ORDERED:

(1) THAT the dispositive motions of Shee Atika and the Federal defendants are granted in part as follows:

(a) defendants are granted summary judgment with respect to plaintiffs' claims pursuant to ANCSA § 17(b);

(b) plaintiffs' claims pursuant to the Property Clause of the United States Constitution are dismissed for failure to state a claim upon which relief can be granted;

(c) plaintiffs' claim pursuant to the Due Process Clause of the United States Constitution are dismissed for failure to state a claim upon which relief can be granted;

(d) plaintiffs' claim pursuant to § 306 of the Clean Water Act is dismissed for failure to state a claim upon which relief can be granted;

(e) plaintiffs' claim in paragraph 32 of the Consolidated Complaint pursuant to the National Environmental Policy Act is dismissed for failure to state a claim upon which relief can be granted;

(2) THAT the First Claim of plaintiffs' Consolidated Complaint is dismissed in its entirety;

(3) THAT the dispositive motions of Shee Atika and the Federal defendants are denied with respect to plaintiffs' claims in paragraphs 34 and 35 of the Consolidated Complaint pursuant to the National Environmental Policy Act and §§ 402 and 404 of the Clean Water Act;

(4) THAT plaintiffs' cross-motion for partial summary judgment re inadequacy of EIS for failing to study exchange alternative is granted;

(5) THAT the court declares that the Clean Water Act § 404 permit issued to Shee Atika for the Cube Cove Log Transfer Facility on February 28, 1985, is void;

(6) THAT as of December 11, 1985, Shee Atika shall be enjoined from all use of the Cube Cove Log Transfer Facility until a valid § 404 permit has been obtained;

(7) THAT Shee Atika shall within fifteen days of the date of this order submit a proposed form for partial final judgment;

(8) THAT all other parties shall have ten days from the date of lodging of the proposed form of partial final judgment to file any objections to the same;

(9) THAT Shee Atika's "Motion for Entry of Rule 54(b) Order" (Docket No. 166) shall be held in abeyance pending compliance with item (7) above.

DATED at Anchorage, Alaska this 26th day of November, 1985.

/s/ JAMES VON DER HEYDT
United States District Judge

cc: Lewis F. Gordon
Durwood Zaelke
U.S. Attorney
Jacqueline Luke
Jonathan Tillinghast

APPENDIX E

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

Civil Action No. A83-234 Civ

CITY OF ANGOON, *et al.*,
Plaintiff,

vs.

DONALD HODEL, Secretary of the Department of Interior, *et al.*,
Defendants.

MEMORANDUM AND ORDER ON SUBSISTENCE AND TRUST RESPONSIBILITY ISSUES

THIS CAUSE comes before the court on the motions and briefing of the parties on the "subsistence" issues involved in this litigation. Specifically, this memorandum addresses all of plaintiffs' claims arising from Sections 503(c), 503(d), 506(a)(2), 506(c)(1), 810 and 811 of the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (1980). Also addressed in this memorandum are plaintiffs' claims relating to an alleged federal trust responsibility growing out of Title VIII of ANILCA.

Today the court issues a separate memorandum and order directed to claims arising out of § 22(k) of ANILCA. The remaining issues in plaintiffs' consolidated complaint, filed April 29, 1985, shall be addressed in a subsequent memorandum and order.[1]

[1] The court finds plaintiffs have waived those issues raised in prior complaints not included in the consolidated complaint.

This action arises out of Shee Atika, Inc.'s selection, confirmed by Congress, of certain lands on Admiralty Island. Shee Atika is the native village corporation, established under the Alaska Natives Claims Settlement Act, for those Natives living in Sitka. Shee Atika's land selection is comprised of approximately 23,000 acres on the northwest section of the island. In order to maximize the amount of harvestable timber, the selection extends over several creek drainages and includes lands in the vicinity of Cube Cove, Peanut Lake, Lake Kathleen, Lake Florence, and Ward Creek (hereinafter Cube Cove lands). *See* ANILCA § 506(c).

At the same time that Congress conveyed the Cube Cove lands to Shee Atika, it also established Admiralty Island National Monument and Wilderness. *See* ANILCA §§ 503(b) and 703(a)(1). This Wilderness encompasses all of Admiralty Island, with the exception of some lands on the north end of the island around Mansfield Peninsula, the Shee Atika lands, and some lands surrounding the Greens Creek Mineral Deposit.[2] Further, assuming Shee Atika's position in this litigation is correct, its inholding would be the only lands within the Monument subject to timbering.[3] Shee Atika plans to harvest approximately 20,000 acres of their Admiralty Island timberlands and build a log transfer facility (LTF) at Cube Cove. Because of the configuration of the Cube Cove lands, their harvest could affect the wilderness character of a large surrounding area of public land as well, perhaps as much as 80,000 additional acres.

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[2] While the Admiralty Island National Monument contains 921,000 acres, the Wilderness only contains 900,000 acres. *Compare* ANILCA § 503(b) with § 703(a)(1). The two sections apparently refer to the same map. *See* Ex. 2, attached to Docket Entry #111. This map establishes different boundaries for the two near Greens Creek, at the north end of the Monument. The 21,000 acre difference is further explained by legislative history. *See* 126 Cong. Rec. S11125 (Aug. 18, 1980) (statement of Sen. Roth); *id.* S11137 (material submitted by Sen. Gravel); *Id.* S11194-95 (Aug. 19, 1980) (statement of Sen. Jackson).

[3] The Greens Creek lands cannot be logged. ANILCA § 503(d).

Plaintiff City of Angoon, a native village located on Admiralty Island, alleges that this harvest will interfere with the subsistence hunting of its citizens. Plaintiff Sierra Club seeks to preserve the entire island as an undisturbed wilderness. For these reasons, plaintiffs are challenging the conveyance of the Cube Cove lands to Shee Atika and the validity of the government permits associated with harvesting.[4]

I. The Exchange Argument

Plaintiffs' major contention is that Congress, in granting the Cube Cove lands to Shee Atika, intended that the lands be used for exchange purposes only. Accordingly, they argue that Congress intended the timber harvesting prohibition in ANILCA § 503(d) to apply to the Cube Cove lands. As stated in their briefs:

> In sum, while Congress conveyed the inholding to Shee Atika, Inc., it did so with the intent that it would be exchanged for other timber lands outside the Monument Wilderness, just as had been done by the other Native Corporation that earlier claimed the same land. Pending an exchange, however, Congress ensured that the inholding would not threaten the surrounding National Monument Wilderness or Angoon's traditional subsistence culture.

Section 503(d) states:

> Within the Monuments, the Secretary shall not permit the sale of [sic] harvesting of timber: *Provided,* That nothing in this subsection shall prevent the Secretary from taking measures as may be necessary in the control of fire, insects, and disease.

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[4] For additional background information, *see City of Angoon v. Marsh,* 749 F.2d 1413 (9th Cir. 1984).

The plaintiffs argue that "within the Monuments" means within the *boundaries* of the Monuments; defendants counter that the prohibition only applies to public land within the Monuments.[5]

A number of arguments support plaintiffs' position. First, in the same section, when Congress intended a provision to apply solely to public lands, it specifically so stated. *See* ANILCA § 503(e); *id.* § 503(f)(2)(a). The absence of a comparable limitation in § 503(d) is evidence that Congress intended the provision to apply to both public and private lands.[6] Second, Congress placed similar use restrictions on Kootznoowoo, Inc. lands within the boundaries of the Monument. *See* § 506(a)(3)(C). That Congress placed restrictions on Kootznoowoo lands indicates an intent to preserve the wilderness nature of the island to the greatest extent possible.[7] Third, in § 506(d) Congress created a continuing authorization to reimburse Shee Atika for part and *future* expenses incurred in the exchange process. This again indicates that an off-island exchange was within the contemplation of Congress. Fourth, plaintiffs' position is supported by § 103(c). This section states that Native Corporation lands "shall [not] be subject to the regulations applicable *solely to future public lands* within [a conservation system] unit." (emphasis added). This language demonstrates that, at least in some instances, Congress intended regulations to apply to both private and public lands within a unit. Otherwise, the distinction created in this subsection would not be necessary. Finally, plaintiffs' case is aided by the rule that ambiguities in the subsistence provisions of ANILCA must be construed in favor of subsistence. *E.g., People of the Village*

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[5] Initially, the court finds that it is not bound by the prior Ninth Circuit opinion in this action in that the opinion is not the law of the case. *See Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830, 832 n.3 (9th Cir.), *cert. granted*, 105 S. Ct. 3475 (1985). Accordingly, this court considers this argument de novo.

[6] Plaintiffs apparently concede in their briefs that the Cube Cove lands are private lands. *See also City of Angoon v. Marsh*, 749 F.2d at 1416; ANILCA §§ 102(3)(B), 103(c).

[7] Conversely, however, the absence of a similar restriction in § 506(c) may indicate that Congress did not intend a similar restriction be placed on the Cube Cove lands.

of Gambell v. Clark, 746 F.2d 572, 581 (9th Cir. 1984). *See also Southeast Alaska Conservation Council v. Watson* (SEACC III), 697 F.2d 1305, 1309 (9th Cir. 1983) (requiring ANILCA to be interpreted in light of its underlying protective purposes).

Section 506(c)(1), however, purports to convey the entire surface estate of the Cube Cove lands to Shee Atika. The court finds it unlikely that Congress would, in one section, convey this estate of Shee Atika "[i]n satisfaction of the rights of the Natives of Sitka" under ANCSA, and then in a different section retain the primary beneficial use of that estate without referring to that restriction in the grant. In the parallel land grant to Kootznoowoo in § 506(a)(3), Congress used specific language to reserve timber rights. *See* § 506(a)(3)(C)(i). The presence of a logging restriction in § 506(a)(3) casts doubt on plaintiffs' interpretation of § 503(d) for an additional reason as well. If plaintiffs' version of that section were correct, there would be no reason to place a duplicate restriction in § 506. As noted by plaintiffs in their briefs, it is a common rule of statutory construction that, if possible, a statute must be construed to give meaning to every section, so that no section is rendered surplusage.

Based on the above, the court finds that the language of § 503(d) is ambiguous, and accordingly it turns to legislative history to assist with interpretation.

Initially, the court finds that legislative history supports the presumption, in the absence of clear evidence to the contrary, that placement of Native Corporation land within the boundaries of a conservation system unit was not intended to affect the rights of corporations to use that land. *See* 126 Cong. Rec. 11194 (daily ed. Aug 19, 1980) (statements of Sen. Stevens & Sen. Jackson); 125 Cong. Rec. H2699 (daily ed. May 4, 1979); *id.* at H3239-49 (daily ed. May 15, 1979) (statements of Cong. Sieberling).

The court has closely reexamined ANILCA's legislative history. Simply stated, it has found no credible evidence in that history supportive of plaintiffs' position. The evidence all points to the opposite: that the Cube Cove lands were conveyed to

Shee Atika for its use and enjoyment, and not for exchange purposes only. This is not to say that Congress did not hope or expect that an exchange would occur. Congress's clear desire was that Shee Atika exchange its lands for off-island lands. However, Congress never intended to force Shee Atika into an exchange that was not voluntary on both sides.

The starting point for an analysis of ANILCA's legislative history is a substitute version of H.R. 39 reported by the Senate Energy Natural Resources Committee to the Senate on November 14, 1979.[8] The Act as passed, i.e., the Tsongas Substitute (a.k.a Amendment 1961) was a revision of that bill and built on its structure. *See e.g.,* 126 Cong. Rec. S11116 (daily ed. Aug. 19, 1980) (statement by Sen. Tsongas); *id.* at S11189. Furthermore, it is in the Senate Committee bill that § 506(c), the Shee Atika land conveyance, first appeared in its present form. *See* § 508(c), reprinted in S. Rep. No. 96-413, 96th Cong., 1st Sess. 25 (1979).

All sides agree that the Cube Cove land conveyance, as reported by the Senate Energy Committee, does not *require* Shee Atika to exchange its grant for lands off Admiralty Island. *See id.* at 214-15, 404-05; *see also* Senate Energy and National Resources Committee Markup Session on S. 9, October 29, 1979 at 516-47 (Appendix D, attached to Docket #121 A83-234) (supporting view that any exchange was to be voluntary).[9] Plaintiffs' theory is that the Tsongas substitute, through modifications to § 503(d) to include Admiralty Island and the addition of the subsistence protections in § 506(a)(2), intended to modify the grant in § 506(c) to prohibit harvest of timber. In support of this view, plaintiffs point to the statements of several Senators that seem to indicate that *all* of

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[8] This court discussed the Act's legislative history in greater detail in its earlier order issuing a Preliminary Injunction. That discussion is hereby incorporated into this memorandum by reference. *See* Memorandum and Order of May 15, 1984, A84-126, at 7-11.

[9] Furthermore, none of the previous House bills had mandatory exchange provisions. *See e.g.,* H.R. 39, § 606(b)(4) as reported by the House Committee on Interior and Insular Affairs, *reprinted in* H. Rep. No. 96-97, Part I, 96th Cong. 1st Sess. 37 (1979); H. Rep. No. 96-97, Part I, 96th Cong., 1st Sess. 225, 275-276 (1979); H. Rep. No. 96-97, Part II, 96th Cong., 1st Sess. 35 (1979).

Admiralty Island was to be preserved as a wilderness. *See e.g.*, 126 Cong. Rec. S11119 (Aug. 18, 1980) (statement of Sen. Jackson).

There are a number of reasons why this version of legislative history is inaccurate. First, the Tsongas substitute was a compromise between the more development-oriented Senate version of H.R. 39 and the more protectionist-oriented House version of that bill. It is unlikely that a compromise between those two bills would, in effect, mandate that Shee Atika exchange its lands through the imposition of a timbering prohibition when both Houses previously had in their separate versions of the bill made any future land exchange voluntary.

Second, any reference to protecting "all" of Admiralty Island most likely refers to the Senate's accession to the House's version of the Act that included both the east and west halves of the island in the Wilderness. The prior Senate bill had only designated the eastern half of Admiralty Island as wilderness. *See, e.g.*, 126 Cong. Rec. S11117 (Aug. 18, 1980); *id.* S11192 (Aug. 19, 1980).

Third, in several instances Senators discussing the Tsongas substitute specifically noted that an exception to the wilderness had been created for Shee Atika. *See id.* S11125 (Aug. 18, 1980) (statement of Sen. Roth) (stating the bill contains "exclusions for minerals and native needs"); *id.* S11137 (submission of Sen. Gravel) (compromise "retains Shee Atika land selections on northwest side of Admiralty Id."); *see also id.* S11124 (statement of Sen. Cranston) ("The compromise, however, does not protect in entirety the Admiralty Island National Monument"). The House debate on the Tsongas substitute similarly indicates that the lands were not encumbered by § 503(d). *See id.* H10550 (Nov. 12, 1980). This passage's reference to ANCSA § 22(k) would be nonsensical unless timbering were allowed on the Cube Cove lands.

Fourth, the Senators attempted, during debate, to create a legislative history for the Tsongas substitute by listing significant changes from the Senate Committee version of the bill. During these discussions no mention is made of the Shee Atika lands. *See id.*, S11117 (Aug. 18, 1980); *id.* S11189, 11192

(Aug. 19, 1980). Both these lists of changes mention the Kootznoowoo exchange as an amendment, however. Had there been a change regarding the Shee Atika exchange, it almost certainly would have been listed as well. The absence of any such mention strongly suggests that the Senate intended to retain the interpretation of 506(c) contained in the Committee Report.

Furthermore, for Congress to grant the Cube Cove lands to Shee Atika for exchange purposes only would be unusual. It is not credible to believe that Congress could intend to deprive Shee Atika of any economic use of its lands, thereby depriving Shee Atika of much of its bargaining power and forcing an exchange, without making some mention of that intent in the legislative history. As a point of comparison, when the earlier House version of H.R. 39 attempted to arrange a voluntary land exchange, the bill contained specific statutory exchange language and specific referral was made to the exchange provision in the House Committee print.[10]

Finally, the legislative history of § 503(d) itself suggests that Congress intended it to apply solely to public Monument lands. The section, as first drafted, applied only to the Misty Fjords National Monument. *See* § 505(c), H.R. 39, *as reported in* S. Rep. No. 96-413, 96th Cong., 1st Sess. 20 (1979). The section did not apply to Admiralty Island for the reason that the bill did not create a Monument on Admiralty Island. What the bill did create was a Misty Fjords Monument comprised of more lands that the Misty Fjords Wilderness. *Compare id.* § 505(a) with *id.* § 703(a)(5). Given that the logging prohibition implicit in § 703(a) of that bill prevented logging in the Wilderness portion of the monument, the purpose of § 505(c) must have been to prevent logging in the remainder of the

[10] As further evidence of Congress's intent that any land exchange be voluntary, *see* § 506(a)(8)(A). It is unlikely that Congress would have made the Kootznoowoo exchange voluntary while making the Shee Atika exchange mandatory.

Monument (which was not declared wilderness to allow mining to occur).[11] The Tsongas substitute for the first time created a National Forest Monument on Admiralty Island. Like the Misty Fjords National Monument in the Senate Committee version of H.R. 39, the Admiralty Island Monument also contained lands not contained in the wilderness. Monument also contained lands not contained in the wilderness. The extension of § 503(d) to Admiralty Island National Monument was thus intended to prevent logging on those *Monument* lands not in the Wilderness, *i.e.*, the Greens Creek mining district.

The Senate Committee Report's comments on § 503(d) also show that the section was intended to apply solely to public lands. *See* S. Rep. No. 96-413, 96th Cong., 1st Sess. 209 (1979). In an apparent reference to the effects of § 503(d) (§ 505(c) in the Senate Committee version of H.R. 39), the report states that the monument "is closed to the sale or harvest of timber under Forest Service timber sale program." As the timber sale program only applies to public lands, it is reasonable to conclude that § 503(d), as drafted, was intended to apply only to those lands. Given that the language of § 503(d) was not changed when the Tsongas substitute expanded it to cover Admiralty Island Monument, it is improbable that Congress intended to broaden its scope to include non-public lands.

In conclusion, the court holds:

(1) That ANILCA §§ 503(c) and 503(d) do not apply to private lands within a monument and therefore do not apply to Shee Atika's Cube Cove lands; and

(2) That Congress did not intend the conveyance in § 506(c) to be for exchange purposes only. While Congress hoped that an exchange would occur, it intended that any such exchange be voluntary on both sides. Therefore, § 506(c) grants Shee Atika full economic and beneficial use of its lands, subject of course to the valid existing rights and easements referred to in that section.

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[11] *See, e.g.*, S. Rep. No. 96-413, 96th Cong., 1st Sess. 403 (1979). That § 703 prohibits logging within a wilderness is shown by the fact that Congress did not feel it necessary to explicitly prohibit logging in any other National Forest Wilderness.

II. Section 506(a)(2).

Section 506(a)(2) of ANILCA states "Nothing in this section shall affect the continuation of the opportunity for subsistence uses by residents of Admiralty Island, consistent with Title VIII of this Act." Plaintiffs interpret the language "this section" to refer to § 506 as a whole, including the § 506(c) conveyance of the Cube Cove lands to Shee Atika. They thus claim that this section continues to grant certain subsistence rights to the Cube Cove lands to the villagers of Angoon.

Section 506(a) was not included in ANILCA until the Tsongas substitute. Therefore, little legislative history exists concerning this section.[12] Plaintiffs' theory, however, depends on an interpretation of ANILCA similar to that proposed for § 503(d): namely, that Congress intended to restrict Shee Atika's uses of the Cube Cove lands in order to further an exchange. For the reasons stated previously, the court finds that Congress did not intend to compel any exchange.

The court further finds that the phrase "consistent with Title VIII of this Act" indicates that Congress intended the section to apply solely to public lands, for the reason that Title VIII only places restrictions on such lands. *See, e.g.,* ANILCA § 801(4). Since Shee Atika's lands are not Monument lands or public lands, *see* ANILCA § 102(3)(C), § 506(a)(2) does not place any restriction on their use.

This conclusion is supported by the fact that § 506(a)(2) is only intended to apply to subsection § 506(a), and not all of § 506. This limited scope of the section is shown (1) by its placement between two other sections, 506(a)(1) and 506(a)(3) that are concerned solely with the Kootznoowoo exchange, and (2) by the fact that § 506(a) was introduced in the Tsongas substitute as a discrete unit. Sections 506(a), (b), and (c) are each designed to stand as independent units. It is thus unlikely that Congress intended only the one subsection

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[12] What little legislative history there is makes no mention of any restriction on the Cube Cove lands. *See* 126 Cong. Rec. S11117 (Aug. 18, 1980); *Id.* at S11137; *Id.* at S11192 (Aug. 19, 1980).

within § 506, § 506(a)(2), to apply outside the subsection within which it is found. That § 506(a) was introduced at a later date than 506(c) is additional evidence that Congress did not intend the two sections to modify one another.

The court therefore holds that § 506(a)(2) does not apply to Shee Atika's holdings on Admiralty Island.

III. Section 810

Plaintiffs argue that a § 810 subsistence evaluation was required for each of the following government actions:

> (1) the Corps of Engineers permit required for the log transfer facility under § 404 of the Clean Water Act;
>
> (2) the Environmental Protection Agency permit required for the LTF under § 402 of the Clean Water Act;
>
> (3) the Bureau of Indian Affairs loan to Shee Atika that allowed the timber harvesting operation to proceed;
>
> (4) the Forest Service's failure to act pursuant to § 503(c) and ANCSA § 22(k); and
>
> (5) the Secretary's transfer of the Cube Cove lands to Shee Atika pursuant to § 506(c).

Section 810(a) of ANILCA requires that:

> In determining whether to withdraw, reserve, lease or otherwise permit the use, occupancy or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands . . . shall evaluate [the effect of the action on subsistence . . . .]

It is thus clear that, before a subsistence evaluation is required under § 810, there must be some action that affects public land. Public land is defined in § 102(1)-(3). Given that Shee Atika's lands on Admiralty Island are not public lands, a use or disposition of those lands is not sufficient to trigger § 810's requirements.

Plaintiffs argue, first, that the EPA's and Corps' granting of permits under Sections 402 and 404 of the Clean Water Act required a § 810 subsistence evaluation because these determinations "used" public "land," which § 102(1) defines to include interests in land. The interest in land allegedly used was a navigational servitude. In order for the servitude to be public land, title thereto must belong to the United States. *See* § 102(2) ("the term 'Federal land' means lands the title to which is in the United States . . . . "). Since the United States does not hold title to the navigational servitude, the servitude is not public land within the meaning of ANILCA. *See United States v. Virginia Electric and Power Co.*, 365 U.S. 624, 627-28 (1961) (holding servitude is, in fact, "power of government to control and regulate navigable waters in the interest of commerce.") Similarly, the BIA loan, being for the development of Shee Atika's private lands, does not use or dispose of public lands.

Plaintiffs counter that public lands are nevertheless being used for the reason that logging on Shee Atika's private lands will have spillover effects on public lands. For the purpose of this motion, the court assumes that such spillover effects will occur. Nevertheless, the court finds that no § 810 subsistence evaluation is needed. Section 810 only applies to a determination of whether to permit a use of public lands *by "the head of the Federal agency having primary jurisdiction over such lands."* Thus, § 810 presupposes both a "use" of federal land and a determination of whether to allow the use by the agency head having primary jurisdiction over such land. By implication, the use determination triggering § 810 must be one concerning use of land within the determining agency's jurisdiction. Stated more simply, before § 810 is triggered, there must be (1) a land use determination (2) by an agency having primary jurisdiction over some land (3) regarding a use of the determining agency's land. Conversely, a decision by an agency that does not initially affect land within its primary jurisdiction does not trigger a § 810 subsistence review. Thus, the spillover effects alleged here, without an allegation of use of land within the determining agency's jurisdiction, do not require a § 810 evaluation.

The Forest Service's alleged failure to act pursuant to ANILCA § 503(c) and ANCSA § 22(k) also does not require a § 810 evaluation. The language of § 810 presupposes some land use decision resulting from a "determination." The failure to exercise authority is not a determination within the meaning of ANILCA § 810. *See Alaska v. Andrews,* 591 F.2d 537 (9th Cir. 1979).

Finally, the Secretary was not required to perform a § 810 evaluation prior to transferring the Cube Cove lands to Shee Atika pursuant to § 506(c). The Cube Cove lands simply are not public lands within the meaning of ANILCA § 810(a). *See* ANILCA § 102(3)(B). *See also id.* § 810(c).

IV. Section 811

Plaintiffs argue that Shee Atika's timber harvest is somehow affected by § 811. Section 811 only applies to access to subsistence resources over public lands. *See, e.g.,* § 802, § 811(b). It does not permit the Secretary to control access over private lands. Shee Atika's lands being private, § 811 does not apply.

V. Trust Responsibility

Plaintiffs claim that the conveyance, the permits for timber operations, and the timber operations themselves all violate a federal trust responsibility owed to Angoon. The alleged breach of trust is the basis for Angoon's prayer for a damage award against the federal defendants.

Plaintiffs concede that in this context the federal government does not owe Natives a generalized fiduciary duty that exists in the abstract. *E.g., Inupiat Community of the Arctic Slope v. United States,* 548 F. Supp. 182, 188 (D. Alaska 1982), *aff'd,* 746 F.2d 570 (9th Cir. 1984). Rather, any trust responsibility must be rooted in a statute, treaty, or executive order. Plaintiffs assert that Title VIII and the related § 506(a)(2) of ANILCA provide the basis for such a responsibility, because the Ninth Circuit Court of Appeals has characterized Title VIII as "Indian legislation." *People of Village of Gambell v. Clark, supra,* 746 F.2d at 581.

In *Gambell* the Court of Appeals merely held that Title VIII is Indian legislation for the purpose of statutory construction. It does not follow that it creates a fiduciary relationship between the federal government and Native beneficiaries. A broad fiduciary relationship may be found where a statute establishes "elaborate control" over Native property, or where it expressly mandates in broad terms that federal agents act for the benefit of Natives. *United States v. Mitchell*, 463 U.S. 206, 224-26 (1983) (Mitchell II). A more limited trust responsibility arises in connection with statutes governing Native property but lacking the above characteristics. *United States v. Mitchell*, 445 U.S. 535, 543-47 (1980) (Mitchell I); *see also Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979). Title VIII, however, governs public lands, not Native lands. Moreover, while the title is aimed at protection of Native interests and therefore is "Indian legislation" for the purposes of statutory construction, it differs from the statutes interpreted in *Gambell, Aguilar,* and the *Mitchell* cases in that it has a broader thrust: It also aims to protect non-Native subsistence interests. Sec. 801(1). There is no precedent binding on this court that supports a finding that Title VIII creates a fiduciary relationship between the United States and the people of Angoon.

There is authority outside this district that does support a finding of a trust responsibility of some nature in the context of a statute, such as Title VIII, that protects subsistence. *See People of Togiak v. United States*, 470 F. Supp. 423, 428 (D.D.C. 1979); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 255-58 (D.D.C. 1973), *rev'd in part on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974). But any such responsibility would be limited to a duty to obey the dictates of Title VIII.[13] In an analogous case involving environmental statutes protecting resources used by Natives for subsistence, the Court of Appeals for the District of Columbia

[13] Such a fiduciary duty coextensive with the terms of the statute would not be superfluous, for it could give rise to an action for damages where one might not otherwise exist. *Mitchell II, supra.*

Circuit found no independent substantive duties arising out of federal trust responsibility:

> [T]he substantive interests of the Natives and of their native environment are congruent. The protection given by the Secretary to one, as we have held, merges with the protection he owes to the other.

North Slope Borough v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980). Since this court holds that the federal defendants have not violated Title VIII, it follows that they have violated no trust responsibility growing out of that title.

Accordingly, IT IS ORDERED:

(1) THAT Shee Atika's motion for summary judgment on subsistence counts, dated Oct. 31, 1983, is granted (*see* Docket #81, A84-126 CIV);

(2) THAT Angoon's cross-motion for summary judgment on ANILCA § 811(a) is denied;

(3) THAT Sierra Club's cross-motion for summary judgment on ANILCA § 810 is denied;

(4) THAT plaintiffs' claims pursuant to ANILCA §§ 503(c), 503(d), 506(a)(2), 506(c)(1), 810 and 811 are dismissed;

(5) THAT plaintiffs' claims pursuant to the federal trust responsibility to Natives are dismissed;

(6) THAT Shee Atika's motion for partial summary judgment, dated Sept. 21, 1983 (*see* Docket #8, A83-234) is granted in part as follows:

(a) The court declares that the lands conveyed to Shee Atika by the Secretary of Interior on December 9, 1981, pursuant to Section 506(c) of ANILCA, are private lands, not subject to any of the subsistence provisions of ANILCA; and

(b) The court declares that the lands conveyed to Shee Atika on December 9, 1981, pursuant to Section 506(c) of ANILCA, are "Settlement Act lands" that

may be developed commercially by plaintiff, and that such lands need not be managed as the Admiralty Island National Monument lands are managed; and

(7) THAT Shee Atika's motion for decision on subsistence counts, in light of this order, is denied as moot.

DATED at Anchorage, Alaska, this 17th day of October, 1985.

/s/ JAMES VON DER HEYDT
United States District Judge

cc: Lewis F. Gordon
Durwood Zaelke
U.S. Attorney
Jacqueline Luke
Jonathan Tillinghast

APPENDIX F

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

Civil Action No. A83-234 Civ

CITY OF ANGOON *et al.*,
Plaintiff,

vs.

DONALD HODEL, Secretary of the Department of Interior, *et al.*,
Defendants.

PARTIAL FINAL JUDGMENT

Upon consideration of the several dispositive motions filed herein by the parties and Shee Atika, Inc.'s motion for issuance of a Rule 54(b) order, and in conformance of the two Memoranda/Orders entered by the court on October 17, 1985 and the Memorandum/Order entered November 27, 1985, the court finds and determines as follows:

(i) Good cause exists for the issuance of a Rule 54(b) order and a partial final judgment herein.

(ii) Under all the relevant facts and circumstances, including but not limited to financial hardship to Shee Atika due to uncertainty regarding its title to the Cube Cove lands, it is both appropriate and equitable that the rulings made by the court on October 17 and November 27, 1985 be declared final in order that the appellate process may commence without delay.

(iii) Issuance of a Rule 54(b) order will not delay, or otherwise interfere with, adjudication of the remaining

claims in this litigation, the issues already adjudicated being clearly distinct and separate from the remaining issues.

(iv) Issuance of a Rule 54(b) order will facilitate disposition of Shee Atika's renewed motion for recovery on the injunction bond posted by plaintiffs herein.

(v) Issuance of a Rule 54(b) order will present minimal risk of redundant proceedings at the appellate level.

WHEREFORE, the court hereby enters a partial final judgment and orders and adjudges as follows:

1. Final judgment is hereby entered on the claims decided in the Court's October 17 Memorandum/Order on Section 22(k) as follows:

A. Plaintiffs' motion for partial summary judgment regarding Section 22(k) of the Alaska Native Claims Settlement Act (ANCSA) is denied.

B. The dispositive motions of Shee Atika and the federal defendants regarding Section 22(k) are granted in part as follows:

(i) Plaintiffs' claims pursuant to Section 22(k)(1) are dismissed for failure to state a claim upon which relief can be granted.

(ii) Plaintiffs' claims pursuant to Section 22(k)(2) growing out of violations alleged to have occurred on or after December 18, 1983, are dismissed for failure to state a claim upon which relief can be granted.

(iii) Plaintiffs' claims pursuant to Section 22(k)(2) growing out of violations alleged to have occurred prior to December 18, 1983, are dismissed as moot.

2. Final judgment is hereby entered on the claims decided in the Court's October 17 Memorandum/Order on subsistence and trust responsibility issues as follows:

A. Plaintiffs have waived those issues raised in prior complaints not included in the Consolidated

Complaint, and the court enters judgment for defendants with respect to said issues.

B. Shee Atika's motion for summary judgment on subsistence counts, dated October 31, 1983 (Dkt. No. 81, A84-126 CIV) is granted.

C. Plaintiff City of Angoon's cross-motion for summary judgment on Section 811(a) of the Alaska National Interest Lands Conservation Act (ANILCA) is denied.

D. Plaintiff Sierra Club's cross-motion for summary judgment on Section 810 of ANILCA is denied.

E. Plaintiffs' claims pursuant to Sections 503(c), 503(d), 506(a)(2), 506(c)(1), 810, and 811 of ANILCA are dismissed.

F. Plaintiffs' claims pursuant to the federal trust responsibility to Natives are dismissed.

G. Shee Atika's motion for partial summary judgment, dated September 21, 1983 (Dkt. No. 8, A83-234) is granted in part as follows:

(i) The court declares that the lands conveyed to Shee Atika by the Secretary of the Interior on December 9, 1981, pursuant to Section 506(c) of ANILCA, are private lands, not subject to any of the subsistence provisions of ANILCA.

(ii) The court declares that the lands conveyed to Shee Atika on December 9, 1981, pursuant to Section 506(c) of ANILCA, are "Settlement Act lands" that may be developed commercially by Shee Atika, and that such lands need not be managed as the Admiralty Island National Monument lands are managed.

3. Final judgment is hereby entered on the claims decided in the court's Memorandum/Order of November 27, 1985, as follows:

A. The dispositive motions of Shee Atika and the federal defendants are granted in part as follows:

(i) Defendants are granted summary judgment with respect to plaintiffs' claims pursuant to Section 17(b) of ANCSA.

(ii) Plaintiffs' claims pursuant to the Property Clause of the United States Constitution are dismissed for failure to state a claim upon which relief can be granted.

(iii) Plaintiffs' claims pursuant to the Due Process Clause of the United States Constitution are dismissed for failure to state a claim upon which relief can be granted.

(iv) Plaintiffs' claim pursuant to Section 306 of the Clean Water Act is dismissed for failure to state a claim upon which relief can be granted.

(v) Plaintiffs' claim in paragraph 32 of the Consolidated Complaint pursuant to the National Environmental Policy Act is dismissed for failure to state a claim upon which relief can be granted.

B. The First Claim of plaintiffs' Consolidated Complaint is dismissed in its entirety.

C. The dispositive motions of Shee Atika and the federal defendants are denied with respect to plaintiffs' claims in paragraph 34 and 35 of the Consolidated Complaint pursuant to the National Environmental Policy Act and Sections 402 and 404 of the Clean Water Act.

D. Plaintiffs' cross-motion for partial summary judgment re inadequacy of EIS for failing to study exchange alternative is granted.

E. The court declares that the Clean Water Act § 404 permit issued to Shee Atika for the Cube Cove log transfer facility on February 28, 1985, is void.

F. Effective December 11, 1985, Shee Atika is enjoined from all use of the Cube Cove log transfer facility until a valid Section 404 permit has been obtained.

5. The court expressly finds that there is no just reason for delay of entry of final judgment on the claims disposed of herein, and the court expressly directs the entry of final judgment on said claims.

DATED at Anchorage, Alaska, this 27th day of December, 1985.

/s/ JAMES VON DER HEYDT
United States District Judge

cc: Lewis F. Gordon
Durwood Zaelke
U.S. Attorney
Jacqueline Luke
Jonathan Tillinghast

APPENDIX G

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT
§ 102, 94 Stat. 2375, 16 U.S.C.A. § 3102 (1985 ed.)

DEFINITIONS

Sec. 102. As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)—

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after the date of enactment of this Act.

(3) The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT
§ 503, 94 Stat. 2399

MISTY FJORDS AND ADMIRALTY ISLAND NATIONAL MONUMENTS

Sec. 503. (a) There is hereby established within the Tongass National Forest, the Misty Fjords National Monument, containing approximately two million two hundred and eighty-five thousand acres of public lands as generally depicted on a map entitled "Misty Fjords National Monument-Proposed", dated July 1980.

(b) There is hereby established within the Tongass National Forest the Admiralty Island National Monument, containing approximately nine hundred and twenty-one thousand acres of public lands, as generally depicted on a map entitled "Admiralty Island National Monument-Proposed", dated July 1980.

(c) Subject to valid existing rights and except as provided in this section, the National Forest Monuments (hereinafter in this section referred to as the "Monuments") shall be managed by the Secretary of Agriculture as units of the National Forest System to protect objects of ecological, cultural, geological, historical, prehistorical, and scientific interest.

(d) Within the Monuments, the Secretary shall not permit the sale of harvesting of timber: *Provided*, That nothing in this subsection shall prevent the Secretary from taking measures as may be necessary in the control of fire, insects, and disease.

(e) For the purposes of granting rights-of-way to occupy, use or traverse public lands within the Monuments pursuant to title XI, the provisions of section 1106(b) of this Act shall apply.

(f)(1) Subject to valid existing rights and the provisions of this Act, the lands within the Monuments are hereby withdrawn from all forms of entry or appropriation or disposal under the public land laws, including location, entry, and patent under United States mining laws, disposition under the mineral

leasing laws, and from future selections by the State of Alaska and Native Corporations;

(2)(A) After the date of enactment of this Act, any person who is the holder of any valid mining claim on public lands located within the boundaries of the Monuments, shall be permitted to carry out activities related to the exercise of rights under such claim in accordance with reasonable regulations promulgated by the Secretary to assure that such activities are compatible, to the maximum extent feasible, with the purposes for which the Monuments were established.

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT
§ 506, 94 Stat. 2406

Admiralty Island Land Exchanges

Sec. 506(c)(1) In satisfaction of the rights of the Natives of Sitka, as provided in section 14(h)(3) of the Alaska Native Claims Settlement Act, the Secretary of the Interior, upon passage of this Act, shall convey subject to valid existing rights and any easements designated by the Secretary of Agriculture, the surface estate in the following described lands on Admiralty Island to Shee Atika, Incorporated:

* * *

[Legal Description Omitted]

* * *

Concurrently with this conveyance, the Secretary shall convey the subsurface estate in the above described lands to Sealaska, Incorporated. As a condition to such conveyances, Shee Atika, Incorporated, shall release any claim to land selections on Admiralty Island other than those lands described in this subsection, and Sealaska, Incorporated, shall release any claim to subsurface rights on Admiralty Island which correspond to the land selection rights released by Shee Atika.

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

§ 810(a), 94 Stat. 2427, 16 U.S.C.A. § 3120(a) (1985 ed.)

Subsistence and Land Use Decisions

Sec. 810(a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

SUBMERGED LANDS ACT
43 U.S.C.A. § 1311(a) (1986 ed.)

§ 1311. Rights of the States

§ 1311(a). It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

SUBMERGED LANDS ACT
43 U.S.C.A. § 1314(a) (1986 ed.)

§ 1314. Rights and powers retained by the United States; . . . .

§ 1314(a). The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the

rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

NATIONAL ENVIRONMENTAL POLICY ACT
42 U.S.C.A. § 4332 (1977 ed.)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there

is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94-83, Aug. 9, 1975, 89 Stat. 424

[1] So in original.

FEDERAL RULES OF CIVIL PROCEDURE
RULE 56. SUMMARY JUDGMENT

(c) Motion and proceedings thereon

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

(e) Form of affidavits; further testimony; defense required

. . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

No. 86-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ANGOON, *et al.*,

Petitioners,

v.

DONALD HODEL, Secretary of the Interior, *et al.*,
SHEE ATIKA, INC., and SEALASKA CORPORATION,

Respondents.

BRIEF OF SEALASKA CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to determine whether the federal government's navigational servitude over State of Alaska waters constitutes "public lands" under §810 of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C.A. §3120(a).

2. Should this Court grant certiorari to determine whether the phrase "within the monument" in §503(d) of ANILCA includes private inholdings that are not a part of the monument.

3. Should this Court grant certiorari to determine whether the court of appeals, under the particular facts of this case, properly directed the entry of summary judgment for appellant Shee Atika, Inc., on the basis of Shee Atika's cross motion below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

STATEMENT OF THE CASE

This case involves three issues and three respondents. Respondent Sealaska Corporation[1] is confining its brief to the third issue—the propriety of the court of appeals' directed entry of summary judgment for appellant Shee Atika, Inc., on the basis of Shee Atika's cross motion in the trial court.[2] The following statement is limited to that issue.

On November 9, 1984 the U.S. Army Corps of Engineers prepared a final environmental impact statement ("FEIS") on a log transfer facility to be built by Shee Atika at Cube Cove on its privately-owned Admiralty Island lands.[3]

On March 4, 1985, the district court consolidated the four individual cases involved in this litigation and ordered Sierra Club/Angoon to file an amended consolidated complaint. The amended complaint was filed on April 3, 1985. E.R. 00001 *et seq.* In the amended complaint, Sierra Club/Angoon alleged that the federal permits issued to Shee Atika violated NEPA. *Id.* at 00014. The complaint specified, however, only one alleged insufficiency in the FEIS—the Corps' failure to study the alternative of coercing Shee Atika into

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[1] Sealaska Corporation is the Alaska Native regional corporation for Southeast Alaska formed pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C.A. §1601 *et seq.*

[2] Sealaska adopts the briefs of the federal respondents and Shee Atika, Inc., with regard to the remaining issues raised by this petition.

[3] Court of Appeals Excerpts of Record ("E.R.") at 00136-00324. The facility required a permit from the Corps under §404 of the Clean Water Act (33 U.S.C.A §1344) and §10 of the River and Harbors Appropriations Act of 1899 (33 U.S.C.A. §403).

exchanging its Cube Cove lands for other lands elsewhere. *Id.* The complaint then went on, in catchall fashion, to say that the federal permits were "otherwise [issued] without complying to the fullest extent possible with NEPA . . .." *Id.*

The parties filed motions and cross-motions for summary judgment, or dismissal, covering every issue raised by the consolidated complaint.[4] As to the NEPA claims, Sierra Club/Angoon moved for partial summary judgment only on the "exchange alternative" issue. E.R. 00116. In its dispositive motion, however, Shee Atika sought dismissal *both* of the specific "exchange alternative" NEPA claim, and as well the catchall claims on the ground that conclusory allegations of NEPA violations were legally insufficient. *See* E.R. 00113.[5]

On May 21, 1985, responding to Shee Atika's dispositive motion, Sierra Club/Angoon devoted one sentence (out of a 33-page brief) to their undeveloped NEPA claims:

> Plaintiffs allege that the EIS is inadequate for other reasons as well, but until they have the opportunity for further factual development, including discovery, and further legal analysis, plaintiffs are not prepared to present their case on these points.

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[4] At this point, the district court proceedings became quite complex. From January, 1985, to issuance of the district court's NEPA Order (November 27, 1985), the parties filed *35* briefs on the merits. E.R. 378-83.

[5] On June 10, Shee Atika further opposed Sierra Club/Angoon's attempt to reserve "undefined, unarticulated NEPA arguments until some indeterminate time in the future."

Finally, on June 18, Sierra Club/Angoon filed an affidavit of counsel submitted under Federal Rule of Civil Procedure 56(f). That affidavit alleged that: (a) Sierra Club/Angoon were not then able to "present by affidavit facts essential to justify their opposition . . ." to Shee Atika's motion on the "other" NEPA claims; (b) they had not yet commenced any discovery on their undeveloped NEPA claims; and (c) believing that success on their exchange alternative issue would make other NEPA discovery unnecessary, they had opted to defer such discovery.[6]

On November 27, 1985, the district court issued its decision on the NEPA issue. The district court granted Sierra Club/Angoon's motion on the "exchange alternative" issue and denied Shee Atika's comprehensive motion. The court of appeals, exercising its plenary authority on summary judgment appeals, reversed both aspects of the ruling. Sierra Club/Angoon then moved to reconsider. Appendix B. The court of appeals denied that petition without opinion. Sierra Club/Angoon Petition for Certiorari, Appendix C.

REASONS WHY THE PETITION SHOULD BE DENIED

In directing the entry of summary judgment for Shee Atika on Sierra Club/Angoon's NEPA claims, the court of appeals acted within its authority to issue any order "as may be just under the circumstances." 28 U.S.C.A. §2106; *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 29 (1983). Its action did not offend this Court's ruling in *Foun-*

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[6] This affidavit is appended as Appendix A to this brief.

tain v. Filson, 336 U.S. 681 (1949), because *Fountain* is inapposite. There are, in addition, prudential reasons why the petition should be denied.

A. The court of appeals action does not conflict with Fountain v. Filson, and the only issue here is a factual one not warranting review

In *Fountain,* the court of appeals directed the entry of summary judgment on an issue that was *not* argued at the district court level. As a result, there was "no occasion in the trial court for Mrs. Fountain to dispute" the claim on which the Court of Appeals ruled. 336 U.S. at 683. The unremarkable holding of *Fountain* is that when a party has *never* had the opportunity to contest a claim, that claim ought not to be resolved against him.

Here, conversely, the issue of Shee Atika's entitlement to summary judgment on *all* of Sierra Club/Angoon's NEPA claims was fully litigated before the district court. Shee Atika moved for dismissal or summary judgment on Sierra Club/Angoon's entire complaint. Sierra Club/Angoon opposed Shee Atika's comprehensive motion by submitting an affidavit, pursuant to Federal Rule of Civil Procedure 56(f), asserting that other undeveloped NEPA issues remained, and that more time was needed. Appendix A.[7]

Because the district court granted Sierra Club/Angoon's cross-motion on the "exchange alternative" is-

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[7] Yes, Sierra Club/Angoon's defense of its "other" NEPA claim was meager—consisting of a footnote in one brief, a passing mention in another, and a cursory affidavit. Sierra Club/Angoon, however, had ample opportunity to do more if they wished.

sue, it did not deal with Sierra Club/Angoon's Rule 56(f) contentions. However, because the issue was actually litigated at the district court, "*Fountain v. Filson* is therefore inapposite." *Morgan Guaranty Trust Company of New York v. Martin*, 466 F.2d 593, 600 n. 10 (7th Cir. 1972). This petition involves no due process issue, since Sierra Club/Angoon have had their day in court. Rather, the only issue presented is the court of appeals' authority to direct the entry of summary judgment for an appellant. That authority, in turn, is established:

> On reversal an appellate court may, in a proper case, order that summary judgment be entered for the appellant, thus avoiding the necessity of further proceedings.

6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice*, ¶¶56.27(1) and (2) (2d ed. 1981); see also *Viger v. Commercial Insurance Company of Newark*, 707 F.2d 769 (3rd Cir. 1983); *Morgan Guaranty Trust Company of New York v. Martin*, 466 F.2d 593; *Stein v. Oshinsky*, 348 F.2d 999 (2nd Cir. 1965), *cert. denied* 382 U.S. 957 (1965).[8]

Application of this rule does not warrant review.[9] The issue is principally a factual one, and this Court

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[8] This Court has affirmed court of appeals' decisions granting summary judgment to appellants below. See, e.g., Kern County Land Company v. Occidental Petroleum Corp, 411 U.S. 582 (1973).

[9] While telling this Court that the court of appeals lacked authority to enter its order, Sierra Club/Angoon conceeded that authority in their rehearing petition, arguing only that the exercise of that authority was unwarranted under the peculiar facts of this case. *See* Appendix B.

does "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Moreover, the court of appeals had before it a district court record providing an ample factual basis for finally ending this controversy. The final EIS was issued a full year before the district court's decision; nonetheless, Sierra Club/Angoon remained unable to articulate a single "other" NEPA claim. Sierra Club/Angoon's demands for additional discovery were as vague as the "other" NEPA claims themselves. Their Rule 56(f) affidavit candidly admitted that they had purposefully done no discovery on their "other" NEPA claims so that they could present their challenges to the EIS seriatim. The token defense of their "other" NEPA claims suggested that Sierra Club/Angoon were less interested in preserving meritorious contentions, and more interested in prolonging a lawsuit then nearly three years old. Under these facts, it was proper for the court of appeals to "perceive no reason for not bringing this litigation to an end." *Stein v. Oshinsky*, 348 F.2d at 1002.

B. There are other prudential reasons for declining review

The court of appeals denial of Sierra Club/Angoon's petition for rehearing was summary. It created no precedent, and its impact is thus confined to the four corners of this lawsuit. While the rehearing order may be important to the parties, it is a non-event to those not connected with this controversy, and this court does not "sit for the benefit of the particular litigants." *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 74 (1955).

Lastly, this petition presents the worst setting imaginable for reiterating the proper role of the appellate courts in summary judgment matters. On the one hand, the district court proceedings were a procedural morass. *See* n. 4, *ante.* On the other hand, Sierra Club/Angoon, by their choosing, developed a poor record on this matter, so much so that it is of virtually no use in formulating any general principles.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

Case No. A83-234 Civil [CONSOLIDATED]

SIERRA CLUB, INC., *et al.*

Plaintiffs,

v.

SHEE ATIKA, INC., *et al.*,

Defendants.

AFFIDAVIT OF LEWIS F. GORDON

I, Lewis F. Gordon, being duly sworn, depose and say as follows:

1. I am legal counsel for the Sierra Club and the City of Angoon in the above-referenced action. I submit this affidavit pursuant to Federal Rules of Civil Procedure 56(f) in support of Plaintiffs' Reply in Support of Cross Motion for Partial Summary Judgment on EIS Inadequacy Issue filed this same date.

2. Plaintiffs cannot at this time, for reasons stated below, present by affidavit facts essential to justify their opposition to defendants' motion for summary judgment on plaintiffs' claims regarding the inadequacy of the Corps' EIS on the log transfer facility.

3. Plaintiffs have not commenced any discovery on the issue of the inadequacy of the EIS for the following reasons.

4. First, the Corps did not issue its Record of Decision on the 404 permit until February 25, 1985, and the con-

solidated complaint, filed pursuant to court order and raising the issue of the inadequacy of the EIS for the first time, was not filed until April 29, 1985. In this short period of time, plaintiffs' counsel has been extremely busy on other aspects of this litigation, preparing various briefs on subsistence and other issues pursuant to the court's briefing schedules. There has been very little time for preparation of discovery requests and for scheduling and taking depositions.

5. Second, plaintiffs believe that success on their cross motion for partial summary judgment on the inadequate alternatives issue would make further discovery on other NEPA issues unnecessary. In the interest of avoiding potentially unnecessary discovery and litigation costs, plaintiffs have put off discovery until after resolution of their Cross Motion for Partial Summary Judgment re Inadequacy of EIS for Failing to Study Exchange Alternative.

6. Plaintiffs' discovery plan regarding the inadequacy of the EIS would in part include the following: (1) request production of all drafts of the EIS, related documents, and comments submitted; (2) have plaintiffs' experts analyze these materials; (3) take depositions of preparers and commentators, especially representatives of state and local governments; (4) have plaintiffs' experts analyze deposition testimony.

6. Even though formal discovery has not been commenced regarding the inadequacy of the EIS, affidavits previously submitted in this lawsuit by experts and subsistence users regarding the subsistence issues show that there are contested issues of fact with regard to the environmental and subsistence effects of the project. Defendants have admitted that these issues of fact are in dispute. See, e.g., Shee Atika's Supplemental Brief on Subsistence Issues, filed April 18, 1985, at 2, n.2. These affidavits suggest potential triable issues of fact regarding

the adequacy of the EIS which will be further explored during the discovery process.

/s/ LEWIS F. GORDON
LEWIS F. GORDON

SUBSCRIBED AND SWORN to before me this 18th day of June, 1985.

/s/ DEBORAH A. TRAVER
Notary Public in and for Alaska

My commission expires: 8/17/86

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 85-4413
86-3582
86-3617
86-3618

DC# CV-83-234
Alaska (Anchorage)

CITY OF ANGOON, THE SIERRA CLUB, *et al.*,
Plaintiffs-Appellees,

v.

DONALD HODEL, Secretary of Interior, *et al.*,
Defendants,

and

SHEE ATIKA, INC.,
Defendant-Appellant,

and

SEALASKA CORP.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

SIERRA CLUB/ANGOON'S PETITION FOR REHEARING

INTRODUCTION

Appellees Sierra Club, The Wilderness Society, and the City of Angoon ("Sierra Club/Angoon") respectfully

petition for a rehearing of the appeal in the above-entitled cause, pursuant to Rule 40, Federal Rules of Appellate Procedure.

Sierra Club/Angoon believe the Court has overlooked material points of law in rendering its decision. While reserving their argued position as to each of the points of appeal, appellees address themselves in this petition solely to the issue of the propriety of the panel's entry of summary judgment in favor of Shee Atika-Sealaska on the adequacy of the Environmental Impact Statement ("EIS") and the validity of the §404 permit for the log transfer facility ("LTF"). Specifically, appellees believe the Court erred in concluding that there were no genuine issues of material fact remaining in *sua sponte* directing summary judgment for Shee Atika-Sealaska.

SUMMARY OF FACTS

The instant controversy involves three consolidated appeals, resulting in turn from the earlier consolidation of four separate proceedings before the district court. On April 7, 1982, the Army Corps of Engineers ("Corps") issued a Department of the Army permit to Shee Atika, Inc. under §404 of the Clean Water Act and §10 of the Rivers and Harbors Act, authorizing the corporation to build an LTF at Cube Cove "for development of its privately-owned lands on western Admiralty Island." ER at 145.[1] On January 13, 1983 the City of Angoon and 287 individual Natives filed their complaint in *Angoon v. Marsh,* alleging, *inter alia,* that approval of a §404 permit for

[1] In this petition, citations to the defendants' Excerpts of Records are in the following form: ER ____. The Sierra Club and the City of Angoon have filed joint additional Excerpts of Record in two volumes. Volume I contains excerpts from *Angoon v. Marsh,* No. A84-126 Civ. (now part of the instant consolidated action). Excerpts from Volume I are cited in the following form: *Marsh* CR ____, Tab ____. Volume II contains excerpts from *Angoon v. Hodel,* No. A83-234 Civ., which are cited as follows: *Hodel* CR ____, Tab ____.

Shee Atika's LTF at Cube Cove without the preparation of an EIS was in violation of the federal defendants' duties pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 *et seq. Marsh* CR 1. On February 28, 1983, Sierra Club and The Wilderness Society intervened as plaintiffs, *Marsh* CR 13, and on March 21, 1983, Angoon and intervenors submitted a motion for preliminary injunction against federal approval of construction of the LTF. *Marsh* CR 20. On March 30, 1983, the federal government stipulated to suspend its earlier approval of the LTF, and to prepare an EIS. *Marsh* CR 28.

On March 22, 1984, Sierra Club/Angoon moved to enjoin construction of the permanent LTF and timber harvesting on 400 acres of the inholding. *Marsh* CR 109. That work had begun even though federal approval was still suspended and the EIS was not yet completed. On March 28, 1984, the court granted a temporary restraining order halting construction of the LTF, but did not enjoin timber harvesting. *Marsh* CR 116. On March 28, 1984, the Corps issued a "Cease and Desist" order directing Shee Atika to halt its illegal fill activities. *Marsh* CR 114.

After expedited briefing and argument in April 1984, the court granted a preliminary injunction against timber harvesting, based on the statutory prohibition in §503(d) of ANILCA ("[w]ithin the Monument[], the Secretary shall not permit the . . . harvesting of timber"). *Marsh* CR 168.

On December 27, 1984, the Ninth Circuit reversed the preliminary injunction. *Angoon v. Marsh,* 749 F.2d 1413 (9th Cir. 1984). The case was remanded to the district court, where *Angoon v. Marsh* was consolidated with *Shee Atika v. Sierra Club I,* No. A83-209, *Shee Atika v. Sierra Club II,* No. A83-234, and *Sierra Club v. Watt,* No. A84-001. The case was renamed *Angoon v. Hodel,* No. A83-234 Civil. *Hodel* CR 58. At that time Shee Atika had pending a motion for summary judgment. This motion did not ad-

dress the validity of the Corps' §404 permit or the adequacy of the EIS.

The Corps' EIS was completed in October, 1984. ER 00136. However, the Corps did not issue its Record of Decision on the §404 permit until February 25, 1985. ER 00325. Soon thereafter, the district court issued an order requiring Sierra Club/Angoon to file a consolidated complaint. This complaint incorporated a new claim that the §404 permit which was issued, or about to be issued, pursuant to the Corps' February 25, 1985 decision was in violation of Sections 101 and 102 of the NEPA. The court further ordered that additional briefing on the existing summary judgment motions be filed within 30 days. (*See* Minute Order, March 4, 1985, *Hodel* CR 58, Exhibit A, attached; ER 00001, 15-16, 19.)

Upon the filing of the consolidated complaint in *Angoon v. Hodel* on April 29, 1985, ER 0001, Shee Atika and the federal defendants moved anew for summary judgment on all claims. ER 00111, 00113. On May 21, 1985, Sierra Club/Angoon filed a cross-motion for Partial Summary Judgment re: inadequacy of EIS for Failing to Study Exchange. ER 00116.[2]

As the foregoing facts demonstrate, the time period between the Corps' final decision and the submission of defendants' consolidated motions for summary judgment on all claims was extremely limited. Moreover, during this time the parties were required to prepare various briefs on subsistence and other issues, pursuant to court order. *Hodel* CR 58, CR 83. For this reason, Sierra Club/Angoon cross-moved for *partial* summary judgment on the limited question of the adequacy of the EIS vis-a-vis its failure to study the alternative of a land exchange, while reserv-

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[2] This cross-motion was subsequently resubmitted by stipulation on June 18, 1985. *Hodel* CR 140.

ing for future consideration other violations of NEPA set forth in plaintiffs' consolidated complaint.

Because of the complicated nature of the case, the number of issues involved, the limited amount of time for discovery following the Corps' issuance of its decision, the possibility that success on plaintiffs' cross-motion for summary judgment would make a lengthy and burdensome consideration by the court of other NEPA issues unnecessary, Sierra Club/Angoon responded to Shee Atika and the federal defendants' motions for summary judgment by stating that complete resolution of all of plaintiffs' claims under NEPA was inappropriate at that time. Sierra Club/Angoon made clear that the adequacy of the EIS in light of the failure to study exchange was only one of plaintiffs' NEPA allegations, and that additional time was needed for discovery so that plaintiffs could fully present their case on these points. (Sierra Club/Angoon's Reply to Motion to Dismiss by Shee Atika and Federal Defendants, May 21, 1985, *Hodel* CR 119. Attached as Exhibit B.) Counsel for Sierra Club/Angoon also submitted an affidavit pursuant to Rule 56(f), Fed.R.Civ.P., requesting additional time to conduct discovery and thus opposing consideration of all EIS-related claims at that time. In support, this affidavit cited the numerous affidavits and admissions already on file which demonstrated the existence of controverted material issues of fact. (Plaintiffs' Reply In Support of Cross-Motion Summary Judgment on EIS Inadequacy Issue. Affidavit of Lewis F. Gordon, June 18, 1985, *Hodel* CR 143. Attached as Exhibit C.) Because the district court granted plaintiffs' cross-motion for partial summary judgment, counsel's 56(f) affidavit and the other claims to which it related were never ruled upon below. *See* ER 00045, 00053-65; *Hodel* CR 146.

ARGUMENT

In reviewing the grant or denial of summary judgment, the appellate court is faced with the same task and gov-

erned by the same standard as that before the district court. *Jewel Companies v. Pay Less Drug Stores Northwest,* 741 F.2d 1555, 1559 (9th Cir. 1984). The court must determine, "on the basis of the pleadings, affidavits, depositions and other evidence available at the time the motion was made," whether there are any genuine issues of material fact and whether either party is entitled to prevail as a matter of law. *Jewel,* 741 F.2d at 1559; Fed.R.Civ.P. 56(c). The appellate court's review is to be *de novo* (*State of Alaska v. United States,* 754 F.2d 851, 853 (9th Cir. 1985), *cert. denied,* 016 S.Ct. 333 (1985); *Callahan v. Woods,* 736 F.2d 1269, 1272 (9th Cir. 1984)), and all evidence, facts, and inferences that can be drawn from the depositions, admissions, and affidavits on file must be viewed in the light most favorable to the party opposing summary judgment (*Aronsen v. Crown Zellerbach,* 662 F.2d 584, 591 (9th Cir. 1981), *cert. denied,* 459 U.S. 1200 (1983); *Spectrum Financial Companies v. Marconsult, Inc.,* 608 F.2d 377, 380 (9th Cir. 1979), *cert. denied,* 466 U.S. 936 (1980)).

As Judge Sneed has previously noted, the granting of summary judgment is appropriate only where there is *no* genuine issue as to any material fact. *Hutchinson v. United States,* 677 F.2d 1322, 1325 (9th Cir. 1982). In making this determination, the court has a duty to consider the record as a whole (*John v. State of Louisiana,* 757 F.2d 698, 711-712 (5th Cir. 1985)) including documentary evidence previously submitted to the court (*Friends of the Earth v. Facet Enterprises, Inc.,* 618 F.Supp. 532, 535 (D.N.Y. 1984)). The appellate court, like the trial court, is precluded from resolving factual disputes on motion for summary judgment (*New York Life Insurance Co. v. Baum,* 707 F.2d 870, 871-72 (5th Cir. 1983)), and cannot "weigh the evidence, pass upon credibility, or speculate as to the ultimate findings of fact" (*Aronsen,* 662 F.2d at 591). Rather the court must resolve all doubts in favor of the party opposing summary judgment (*F.S. Smithers & Co.,*

Inc. v. Federal Insurance Company, 631 F.2d 1364, 1366 (9th Cir. 1980)), including doubts about the existence of a genuine issue of material fact (*Hector v. Wiens,* 533 F.2d 429, 432 (9th Cir. 1976) (citing Moore's *Federal Practice* ¶56.15(3) (1974) and citations therein)). *See also Lemelson v. TWR, Inc.,* 760 F.2d 1254, 1260-61 (Fed.Cir. 1985).

Under these well-established principles, the granting of summary judgment for Shee Atika-Sealaska on the adequacy of the EIS and the validity of the §404 permit for the Cube Cove LTS was improper. In light of the procedural posture of the case, as discussed above, it becomes clear that upon reversing the district court's grant of summary judgment for Sierra Club/Angoon, the appellate court erred in failing to remand the case for further proceedings necessary to resolve the issues remaining.

Under 28 U.S.C. §2106, appellate courts are granted broad powers to dispose of a case upon appeal. *MGPC, Inc. v. Dept. of Energy,* 763 F.2d 422, 433-34 (TECA 1985), *cert. denied,* 106 S.Ct. 76 (1985). Despite the fact that a party may not have moved for summary judgment in the court below, §2106's broad grant of authority allows an appellate court to direct the entry of summary judgment in favor of a non-moving party when justice requires. *Id.; Martinez v. United States,* 669 F.2d 568, 570 (9th Cir. 1982); *MGPC,* 763 F.2d at 434. The exercise of this power, however, is appropriate "only in the rare case" (*E. C. Ernest, Inc. v. General Motors Corp.*, 537 F.2d 105, 109 (5th Cir. 1976)), "since such a determination is best left to the trial court. . . ." (*MGPC,* 763 F.2d at 434). Entry of summary judgment by an appellate court is therefore appropriate only "when it would be just under the circumstances" (*id.*), such as when "it is very clear that all material facts are before the reviewing court" (*Ernst,* 537 F.2d at 109), and no purpose would be served by remanding the issue to the district court (*Shaw v. FBI,* 749 F.2d 58, 63 (D.C. Cir. 1984)). This is not such a case.

As Judge Sneed has cautioned, "[w]e are mindful too that summary judgment procedures should be used with care and restraint." *Hutchinson,* 677 F.2d at 1325. This caution is apt, because "the court must keep in mind that the entry of summary judgment terminates the litigation, or an aspect thereof" (*Jones v. Howe Military School,* 604 F.Supp. 122, 124 (D.Ind. 1984)), and "an improvident grant may deny a party a chance to prove a worthy case" (*Lemelson,* 760 F.2d at 1260 (quoting *D.L. Auld Co. v. Chroma Graphics Corp.*, 714 F.2d 1144, 1146 (Fed. Cir. 1983))).

Thus, entry of summary judgment by the appellate court should occur only when it is absolutely clear that there are no genuine issues of fact and the parties have had a full and fair opportunity to raise disputed issues of fact, counter the evidence submitted by an adversary, and present their case. *MGPC,* 763 F.2d at 434; *Callahan,* 736 F.2d at 1275; *Martinez,* 669 F.2d at 570; *Ithaca College v. N.L.R.B.*, 623 F.2d 224, 229 (2d Cir. 1980) (quoting 6 Moore's *Federal Practice* ¶56.12 at 334 (1976)), *cert. denied,* 449 U.S. 975 (1980); *Ernst,* 537 F.2d at 109. Where there are issues most properly left to the trial court, the appropriate course is to reverse the entry of summary judgment and remand the matter to the district court for further proceedings. *Jewel Companies,* 741 F.2d at 1567; *Callahan,* 736 F.2d at 1269; *Suskind v. North American Life & Casualty Co.*, 607 F.2d 76, 84 (3rd Cir. 1979). *See e.g., Grazing Fields Farm v. Goldschmidt,* 626 F.2d 1068, 1075 (1st Cir. 1980) (district court is in better position to examine sufficiency of EIS with aid, if necessary, of further briefs).

These principles are no less applicable where the parties have filed cross-motions for summary judgment. *See Smithers,* 631 F.2d at 1366 (in case involving cross-motions for summary judgment, Ninth Circuit states that moving party must demonstrate absence of issues of material fact and entitlement to judgment as matter of law, with evidence and inferences viewed favorably to opposing party and all

doubts resolved in opposing party's favor); *Callahan,* 736 F.2d at 1275 (in case involving cross-motions for summary judgment, Ninth Circuit declines to grant summary judgment for appellate because appellee would be unfairly deprived of opportunity to present pertinent evidence). Although for purposes of his or her own motion for summary judgment a party may submit an affidavit stating that there are no disputed issues of fact and that summary judgment should be granted, this admission applies only to the legal theory on which the party has submitted such motion, but does not constitute a waiver of the party's right to raise disputed issues of fact with regard to an adversary's contentions:

> "A party moving for summary judgment . . . may make certain concessions in favor of his adversary for the purposes of the motion that do not carry over and support summary judgment for the adversary."

Ernst, 537 F.2d at 109 (quoting Moore, 6 *Federal Practice* ¶56.12 at 56-337 (1976). *See also John,* 757 F.2d at 705; 10A Wright, Miller and Kane, *Federal Practice and Procedure,* Civil, §2720 at 20-22 (1983).

Thus, the court, whether at the trial or appellate level, must review each party's motion independently and determine whether the party has met the strict burden of demonstrating that there are no disputed issues of material fact and that judgment is appropriate on those claims as a matter of law. *United States v. Fred A. Arnold, Inc.,* 573 F.2d 605, 606 (9th Cir. 1978); *Lee v. Dayton Power and Light Co.,* 604 F.Supp. 987, 993 (D.Ohio 1985); *District 12, United Mine Workers of America v. Peabody Coal Co.,* 602 F.Supp. 240, 242 (D.Ill. 1985). The court must take care to ensure that in considering cross-motions for summary judgment, one or the other of the parties is not deprived of its opportunity to be heard on other issues. *Levine v. Fairleigh Dickinson University,* 646 F.2d 825

(3d Cir. 1981). In reversing a lower court's grant of summary judgment, the appellate court must therefore decline to enter summary judgment for the opposing party if a genuine issue of fact exists (*John,* 757 F.2d at 705; *Fred A. Arnold,* 573 F.2d at 606), and should instead remand the case for resolution of those issues which the district court did not pass upon in its initial determination (*Hettleman v. Bergland,* 642 F.2d 63, 68 (4th Cir. 1981); *Grazing Fields,* 626 F.2d at 1074-75; *Connolly v. Pension Benefit Guaranty Corp.,* 581 F.2d 729, 734-35 (9th Cir. 1978), *cert. denied,* 440 U.S. 935 (1979)).

The principles outlined above are particularly applicable here. In moving for partial summary judgment, plaintiffs Sierra Club/Angoon specifically limited their motion to consideration of whether the Corps was required to study a land exchange as a reasonable alternative to the LTF and related harvesting. If, as eventually happened, that motion was granted, a complicated trial on other NEPA issues, requiring the testimony of expert witnesses, could be avoided, and both the court and the parties could be saved considerable, and avoidable, delay and expense.

As stated both in their response to defendants' consolidated motions for summary judgment (*see* Exhibit B) and in the affidavit submitted pursuant to Rule 56(f) (*see* Exhibit C), plaintiffs believed that substantial factual disputes relating to their other NEPA claims existed, but because of the limited time for discovery, they were unable to fully document these facts in opposition to defendants' motions. Plaintiffs also noted that genuine issues of material fact were raised by the affidavits previously submitted with regard to earlier stages of the proceeding. As noted above, the court must make a determination of whether a genuine issue of fact exists of the basis of the record as a whole (*John,* 757 F.2d at 711-12), and documentary evidence already in the record is to be considered (*Friends of the Earth,* 618 F.Supp. at 535). Plaintiffs' declarations, together with the surrounding circumstances, compel the

conclusion that genuine issues of fact existed concerning the validity under NEPA of Shee Atika's §404 permit for reasons other than the EIS' failure to study the exchange alternative, and the awarding of summary judgment in favor of Shee-Atika-Sealaska was therefore inappropriate.

As previously discussed, summary judgment procedures must be used cautiously, so as not to deprive a party of a fair opportunity to be heard. *Hutchinson,* 677 F.2d at 1325. *See Fountain v. Filson,* 336 U.S. 681 (1949) (*sua sponte* entry of summary judgment by court of appeals was error, because it deprived party against whom judgment was entered opportunity to dispute facts material to that claim). For this reason, the Federal Rules allow for situations, such as that presented here, where additional time is needed in order to allow the opposing party a fair opportunity to present its case. *Alghanim v. Boeing Company,* 477 F.2d 143, 148 (9th Cir. 1973); *Argus Inc. v. Eastman Kodak Co.,* 552 F.Supp. 589, 600 (D.N.Y. 1982).

> "The purpose of the rule is to prevent premature grants of summary judgment in cases where, given adequate time to obtain discoverable material from the moving party, the party opposing the motion might be able to establish genuine issues of fact which would preclude summary judgment." (*McVan v. Bolco Athletic Co.,* 600 F.Supp. 375, 378 (D.Pa. 1984).)

As with other affidavits submitted in opposition to a motion for summary judgment, an affidavit submitted pursuant to Rule 56(f) "should be treated liberally" (*Patty Precision v. Brown & Sharpe Manufacturing Co.,* 742 F.2d 1260, 1264 (10th Cir. 1984)), and appropriate relief (either a continuance or denial of the summary judgment motion) should be granted "almost as a matter of course" (*McVan,* 600 F.Supp. at 378 (quoting *Ward v. United States,* 471 F.2d 667, 670 (3rd Cir. 1973)); *Costlow v. United States,* 552 F.2d 560, 563-64 (3rd Cir. 1977)).

> "Further, as an additional precaution against denying a party its chance to prove a worthy case, any doubt as to the presence or absence of disputed issues of material fact must be resolved in favor of the presence of disputed issues, or in other words in favor of the party opposing summary judgment." (*Lemelson,* 760 F.2d at 1261 (citations omitted); *Hector v. Weins,* 533 F.2d 429, 432 (9th Cir. 1976); *Doff v. Brunswick Corp.,* 372 F.2d 801, 804 (9th Cir. 1967), *cert. denied,* 389 U.S. 820.)

Without an opportunity to gather relevant information through discovery, or at the very least to submit affidavits presenting such disputed facts as can be established by the information already on hand, Sierra Club/Angoon will have been deprived of their opportunity to be heard. It is important to note that plaintiffs were given no notice of the fact that the appellate court intended to issue a final ruling on *all* NEPA claims. *See Yashon v. Gregory,* 737 F.2d 547, 552 (6th Cir. 1984) (court must afford party against whom *sua sponte* summary judgment is to be entered notice and opportunity to respond). Pertinent facts and legal arguments pertaining to other defects in the Corps' EIS and resulting §404 permit were neither presented in the parties' briefs nor argued before the panel. Both Sealaska and the Federal Defendants stated in their opening briefs that the question presented was whether the EIS was required to give detailed consideration to the alternative of exchange and the parties' NEPA appeals were clearly based only on that part of the district court's Nov. 27, 1985 ruling prohibiting issuance of a permit for construction of the LTF until the exchange alternative was explored. While Shee Atika's statement of the issues is somewhat convoluted, Shee Atika's briefs deal only with the exchange alternative issue. The Court's misunderstanding about the existence of disputed facts is perhaps understandable, however, because of the misleading statements

put forth by Shee Atika. For instance, in its Opening Brief at 13 Shee Atika states (erroneously) that "[t]he only contention advanced by Sierra Club was that the Corps had violated NEPA by not conducting an in-depth study of exchange. Sierra Club did not challenge in any manner the environmental findings of the Corps." Opening Brief For Shee Atika, Inc., Excerpts Attached as Exhibit D. In its brief, Shee Atika repeatedly refers to "dispositive motions" submitted by the parties. This misleading characterization of the facts with likewise presented to the Court in Shee Atika's December 16, 1985 Motion for Summary Reversal, in which Shee Atika alleged to the Court that "the *only* dispute concerning the legal adequacy of the EIS is whether it sufficiently addressed the alternative of an off-island exchange." Attached as Exhibit E.; emphasis in original.

As this Court has noted, "[I]n passing upon requests for additional time to respond to a motion for summary judgment . . . the absolute right of a party to respond, must be taken into consideration." *Alghanim,* 477 F.2d at 148. Here Sierra Club/Angoon have not been granted a fair opportunity to respond. Because the district court granted plaintiffs' cross-motion for summary judgment, thus invalidating the Corps' EIS, the Rule 56(f) motion was never passed upon. The district court thus never had the opportunity to exercise the discretion appropriately entrusted to it when a party files an affidavit under Rule 56(f) (*Patty Precision,* 742 F.2d at 1264-65), and plaintiffs were deprived of their entitlement of a ruling on their objection before the court disposed of the entire case (*Yashon,* 737 F.2d at 552-53). "Even if the plaintiff were incorrect in arguing that the record was insufficient, he was entitled to be so informed in order that he might respond the the district court's proposal to grant summary judgment with whatever arguments and evidence in the record that he could muster." *Id.* at 552; *Costlow,* 552 F.2d at 564. Without the benefit of either additional evi-

dence that could be presented upon further discovery or submission of a formal response based on the evidence the party opposing summary judgment already has, the court is hampered in its ability to determine that summary judgment is truly appropriate. *MGPC,* 763 F.2d at 428; *Sharlitt v. Gorinstein,* 535 F.2d 282, 283-84 (5th Cir. 1976); *Macklin v. Butler,* 553 F.2d 525, 528 (7th Cir. 1977).

CONCLUSION

Almost thirty years ago the Supreme Court cautioned that parties facing a *sua sponte* grant of summary judgment must be given an opportunity to dispute the facts and present their case. *See Fountain v. Filson,* 336 U.S. 681 (1949). In more recent times, the court of appeal have noted that a party should not be required "to needlessly confuse the issues of a case and additional burdens to the workload of the trial court when the correct disposition of the matter merely requires the court to rule on the motions pending before it." *Patty Precision,* 742 F.2d at 1265. Here plaintiffs properly tendered their objection to final disposition on their NEPA claims without the benefit of further time for discovery. Their allegations of disputed issues of facts must be treated liberally and all doubts must be resolved in their favor. The court below has neither passed on this objection nor afforded plaintiffs an opportunity to make such arguments as they might. Evidence already in the record demonstrates that material issues of fact are disputed by the parties. Arguments pertaining to other aspects of the parties' compliance with NEPA were not briefed or argued before this Court. For all of the foregoing reasons, the entry of summary judgment for Shee Atika-Sealaska on the validity of the EIS and the §404 permit for the LTF was in error, and the case should be remanded to the district court for trial on the issues remaining.

Respectfully submitted,

FURTH, FAHRNER, BLUEMLE & MASON
SIERRA CLUB LEGAL DEFENSE FUND

DATED: November 19, 1986 By /s/ JEFFREY A. GLICK
JEFFREY A. GLICK

DATED: November 19, 1986 By /s/ DURWOOD J. ZALKE
DURWOOD J. ZALKE

No. 86-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ANGOON, *et al.*,
Petitioners

v.

DONALD HODEL, *et al.*,
Respondents

On Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT SHEE ATIKA, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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---

BRIEF IN OPPOSITION OF RESPONDENT SHEE ATIKA, INC.

Respondent Shee Atika, Inc.[1] herewith submits its brief in opposition to the petition for a writ of certiorari filed herein by the Sierra Club, the City of Angoon, *et al.* ("Sierra Club-Angoon"). The petition seeks review of *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986) ("*Angoon II*"). (The court of appeals also issued an earlier opinion herein *sub nom. City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1984) ("*Angoon I*").)

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[1] Shee Atika, Inc. is an Alaska Native corporation formed pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.*, to represent the interests of the Natives of Sitka, Alaska.

STATEMENT OF THE CASE

For the most part, the statement of facts contained in the opinion of the court of appeals in *Angoon II*, supplemented by the statement of facts in *Angoon I*, adequately (and more accurately) states the facts. An additional factual statement is required, however, regarding the so-called Rule 56 claim because that issue was first raised by Sierra Club-Angoon on rehearing.[2]

This litigation, initiated in 1982, involved a multi-count legal challenge by Sierra Club-Angoon to Shee Atika's economic enjoyment of lands conveyed to it pursuant to the Alaska Native Claims Settlement Act ("ANCSA") and the Alaska National Interest Lands Conversation Act ("ANILCA").

In the course of this litigation, upon demand of Sierra Club-Angoon, the Corps of Engineers prepared an environmental impact statement for a log transfer facility proposed to be constructed by Shee Atika on its Admiralty Island lands. The EIS process, commenced in April 1983, culminated with the issuance of a Final Environmental Impact Statement ("FEIS") on November 9, 1984. The FEIS recommended, as the "environmentally preferred alternative",[3] construction of the proposed facility. The FEIS also found that construction/operation of the facility would not significantly adversely affect Native subsistence, and that there would be no adverse impact on public access to Cube Cove, where the facility would be located.[4]

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[2] A copy of the Sierra Club-Angoon petition for rehearing is reprinted in the Appendix as App. A.

[3] NEPA regulations require federal agencies to specify an "environmentally preferred alternative" during the EIS process. *See* 40 C.F.R. §§ 1502.14(e), 1505.2(b) (1986).

[4] Court of Appeals Excerpts of Record ("E.R."), at 159, 264. The FEIS was preceded by a Draft Environmental Impact Statement, released April 6, 1984, which likewise recommended con-

In April 1984, Sierra Club-Angoon obtained a preliminary injunction enjoining Shee Atika from timber harvesting on its Admirality Island lands on the ground that such harvesting was barred by section 503(d) of ANILCA. On appeal, the court of appeals reversed in *Angoon I*, and remanded the case to the district court on December 27, 1984.

On remand, the district court, on March 4, 1985, consolidated the four cases comprising the Shee Atika litigation and ordered Sierra Club-Angoon to file an amended consolidated complaint. The amended complaint was filed on April 3, 1985.[5] Therein, Sierra Club-Angoon conclusorily alleged that the federal permits issued to Shee Atika and the timber operations proposed by Shee Atika were violative of NEPA. The complaint made passing reference to the FEIS, alleging that it was improperly prepared for failure to study the alternative of an exchange of the Cube Cove lands "and otherwise without complying to the fullest extent possible with NEPA. . . ." E.R. 14. The parties filed motions and cross-motions for summary judgment or dismissal covering every issue raised by the consolidated complaint.[6]

In its dispositive motion, Shee Atika sought dismissal of the NEPA counts, *inter alia*, on the ground that undefined, conclusory allegations of NEPA violations were legally insufficient under *Vermont Yankee*.[7] On May 21,

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struction of the facility, and made similar findings concerning subsistence and public access.

[5] While Sierra Club-Angoon purported to file a "draft complaint", this ploy was rejected by the district court as being without authority.

[6] In all, some 113 entries (including 35 briefs) were recorded in the district court docket from the time the case was remanded to the district court (January 1985) to issuance of the district court's NEPA Order (November 27, 1985). E.R. 378-83.

[7] *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978).

1985, responding to Shee Atika's dispositive motion, Sierra Club-Angoon devoted one sentence (out of a 33-page brief) to their "undeveloped NEPA claims", as follows:

> Plaintiffs allege that the EIS is inadequate for other reasons as well, but until they have the opportunity for further factual development, including discovery, and further legal analysis, plaintiffs are not prepared to present their case on these points.[8]

On that same date, Sierra Club-Angoon filed a motion for partial summary judgment on the FEIS, seeking invalidation for failure to study the "exchange alternative". No mention was made therein of any reserved NEPA issues.

Finally, in a June 18 filing, Sierra Club-Angoon perfunctorily opposed dismissal of their "undeveloped NEPA claims", citing to an attached affidavit of counsel. That affidavit alleged (i) that Sierra Club-Angoon were not then able to "present by affidavit facts essential to justify their opposition", (ii) that they had not yet commenced any discovery on their "undeveloped NEPA claims", (iii) that, believing that success on their "exchange alternative" issue would make other NEPA discovery unnecessary, they had opted to defer such discovery. App. A at 27a.

Sierra Club-Angoon did not seek a Rule 56(f) continuance for discovery on the "undeveloped NEPA claims", nor did they formally move that judicial action be withheld on these claims.[9] No Rule 56(f) order was entered by the district court.

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[8] On June 10, Shee Atika specifically opposed the Sierra Club-Angoon attempt to reserve "undefined, unarticulated NEPA arguments until some indeterminate time in the future."

[9] During the year-plus period from release of the FEIS (November 1984) to issuance of the district court's NEPA decision (November 1985), Sierra Club-Angoon never sought any discovery on

On November 27, 1985, the district court issued its decision on the NEPA issue. The court stated the issue as follows:

> The NEPA aspect of plaintiffs' second and third claims may therefore be distilled to the following pair of allegations: that the Section 404 Permit for the log transfer facility (LTF) was issued without compliance with NEPA, and that as a result the log transfer portion of Shee Atika's timber operation may not proceed. The parties have cross-moved for summary judgment on these allegations. [App. D. to the Sierra Club-Angoon Petition at D-7.]

Further, the court described Sierra Club-Angoon's NEPA argument as follows:

> Plaintiffs contend that the EIS is inadequate because it fails to consider, pursuant to NEPA § 102(2)(c)(iii), the possibility that as an alternative to building the log transfer facility Shee Atika could exchange its lands for other federal timberlands not on Admiralty Island. [*Id.* at D-8.]

The court made no mention of any "undeveloped NEPA claims", or that these claims were reserved for further litigation.[10]

In their several briefs to the court of appeals, Sierra Club-Angoon never contended that there remained to be litigated "undeveloped NEPA claims." The existence of these claims was first noted in Sierra Club-Angoon's petition for rehearing. The court of appeals denied that petition, without requesting Shee Atika or other parties to respond thereto.

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the "undeveloped NEPA claims." During this same period, Sierra Club-Angoon sought, and obtained, discovery on other litigation issues.

[10] The district court expressly retained jurisdiction over other claims.

I. THE DECISION OF THE COURT OF APPEALS DOES NO VIOLENCE TO THE FEDERAL GOVERNMENT'S NAVIGATIONAL SERVITUDE, AND DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

Fundamentally misconceiving the essence of the federal navigational servitude, Sierra Club-Angoon posit a decision entrenching upon federal constitutional powers and otherwise at odds with controlling precedent. This case presents no such pernicious elements.

The decision of the court of appeals is fully in accord with this Court's pronouncements on the federal navigational servitude. The navigational servitude—which has its origin in the Commerce Clause—is an attribute of federal sovereignty, and not a real property concept. *See, e.g., United States v. Twin City Power Co.*, 350 U.S. 222, 224-25 (1956) ("That Clause speaks in terms of power, not of property.").

The governmental nature—the sovereignty aspect, if you will—of the navigational servitude power has been stressed by the Court. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375-76 (1977); *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950).[11] The Court has also emphasized that proprietary concepts are

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[11] Even where there has been disagreement as to the applicability of the navigational servitude, there has been unanimity as to its sovereign—as opposed to proprietary—nature. For example, in *United States v. California*, 332 U.S. 19 (1947), Mr. Justice Frankfurter, in dissent, distinguished between ownership rights and exercise of the Commerce Power: "[R]ights of ownership are something else." *Id.* at 44. Similarly, in *Kaiser Aetna v. United States, supra*, Mr. Justice Blackmun, dissenting, noted that what is at issue with respect to the navigational servitude "is a matter of power, not of property." *Id.* at 187.

inapplicable with respect to navigable waters. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913).[12]

Specifically, the decision below does not conflict with this Court's recent decision in *Amoco Prod. Co. v. Village of Gambell*, 107 S. Ct.. 1396 (1987) and *United States v. Cherokee Nation*, 107 S. Ct. 1487 (1987). *Gambell*, to the extent that it is relevant to the instant case, dealt with the interest of the United States in OCS lands, and not the attribute of sovereignty known as the navigational servitude. In fact, the navigational servitude power was not even mentioned in the *Gambell* opinion. OCS lands are clearly more susceptible to proprietary concepts, given that the United States has asserted such ownership interests therein as to command the payment of lease royalties for drilling rights. Such rights are different *in kind* from the exercise of regulatory power embodied in the navigational servitude. Thus, nothing in the decision below conflicts with *Gambell*.

Similarly, the decision below is not at odds, either directly or inferentially, with *Cherokee Nation*. In *Cherokee Nation*, the Court identified the navigational servitude as "an exercise of the Government's power to regulate navigational uses". 107 S. Ct. at 1490. The Court also spoke of the navigational servitude as a matter of "sovereign authority," *id.* at 1492, and stated that a waiver of same would not be lightly implied. *Ibid.* The decision below involved no waiver, no relinquishment, no diminution of the navigational servitude. The federal permit approvals reviewed in the litigation represented an exercise of that governmental power, not frustration of it.

Finally, the decision below is not in conflict with the Submerged Lands Act. That Act distinguishes between "ownership" interests and the governmental power em-

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[12] This case was most recently cited with approval in *United States v. Cherokee Nation*, 107 S. Ct. 1487, 1492 (1987).

bodied in the navigational servitude. *Compare* 43 U.S.C. §§ 1311, 1313 *with* 43 U.S.C. § 1314; *see also United States v. Rands*, 389 U.S. 121, 127 (1967). In the Submerged Lands Act, the United States quitclaimed its proprietary interests in the beds of navigable waterways,[13] while restating the "sovereign authority" of the United States over navigability, as expressed in the navigational servitude concept. There is nothing in the decision below contrary to these policies and concepts.[14]

II. CERTIORARI REVIEW OF THE STATUTORY INTERPRETATION OF SECTION 503(d) OF ANILCA IS NOT WARRANTED AS A MATTER OF POLICY OR ON THE MERITS

On two occasions, the court of appeals has held that section 503(d) of ANILCA cannot legitimately be interpreted to prohibit timber harvesting on Shee Atika's Admiralty Island lands because such a construction would be contrary to congressional intent, and would nullify another provision of ANILCA. *See Angoon I*, 749 F.2d at 1416-18; *Angoon II*, 803 F.2d at 1022-25.

Further review of this issue is not warranted. Section 503(d) of ANILCA applies only to the Admiralty Island National Monument and the Misty Fjord National Monu-

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[13] *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 324 (1973).

[14] There is also no merit to the contention of Sierra Club-Angoon that a regulatory void regarding subsistence will exist absent a finding that section 810 of ANILCA is applicable to federal permitting activities. The FEIS prepared by the Corps specifically addressed the subsistence issue, and, in that regard, it was found that construction/operation of the facility would not significantly adversely affect subsistence. E.R. 159. (The FEIS also found no adverse impact on public access (navigability). E.R. 264.) In *Amoco Prod. Co. v. Village of Gambell*, 107 S. Ct. 1396, 1400 n.5 (1987), the Court listed no less than six environmental statutes which were applicable to OCS activities. These same statutes are applicable to the waters in Cube Cove and other waters within the three-mile limit.

ment. There are no inholdings within these Monuments similar to Shee Atika's, and the question of the interpretation of section 503(d) will not recur. Under such circumstances, Supreme Court review is unwarranted as a matter of policy. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951).

Further, the decision below is not in conflict with either *Gambell* or *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981). *Gambell* involved interpretation of a separate statutory phrase, involving a different statutory framework and a different legislative history. Indeed, the Court noted that the "plain meaning" rule must give way when there is evidence "that Congress actually intended another meaning." 107 S. Ct. at 1406. In the instant case, there was overwhelming legislative history to the effect that Congress intended that Shee Atika develop its lands. *See Angoon I*, 749 F.2d at 1416-18; *Angoon II*, 803 F.2d at 1022-25. The statutory interpretation adopted by the court of appeals was thus consonant with *Gambell* and not contrary to it. In like fashion, the decision below does not conflict with *Minnesota v. Block*. In that case, the court noted that its "plain language" interpretation was consistent with "the purpose and legislative history of the act." 660 F.2d at 1248 n.15. The interpretive route chosen by the court of appeals here was ascertainment of the will and intent of Congress, a methodology fully consistent with the pronouncements of this Court.

Finally, on the merits, the decision of the court of appeals was both legally correct and equitable. The court of appeals concluded that to deny Shee Atika harvesting rights on its Admiralty Island lands would be to deprive it of the most valuable usufruct of those lands, and that such an anomalous, indeed bizarre, result could not have been intended by Congress. The court further held that the interpretation urged by Sierra Club-Angoon would effectively nullify section 506(c) of ANILCA which di-

rected the conveyance of Admiralty Island lands *in settlement* of Shee Atika's ANSCA entitlement, again a result that could not have been intended by Congress.

Review of the Sierra Club-Angoon's interpretation of section 503(d) of ANILCA is clearly unwarranted.

III. THE RULE 56 ISSUE POSITED IN THE PETITION DOES NOT WARRANT REVIEW

Review of the propriety of entry of summary judgment on the adequacy of the FEIS is not warranted for the following reasons: (A) the decision below is not in conflict with the precedents of this Court, nor is it so extraordinary as to call for exercise of this Court's supervisory powers; (B) the record facts do not support the Rule 56 claim alleged by Sierra Club-Angoon; (C) the action of the court below was fully in accord with the spirit and letter of the Federal Rules and the adjudicative law.

A. Review Is Not Called For Under Certiorari Policy

Nothing in the opinion of the court of appeals can be said to be in conflict with the precedents of this Court. Similarly, the opinion below will not perplex, nor will it intimidate, future litigants with respect to Rule 56 procedures.

The opinion of the court of appeals does not discuss Rule 56 standards, does not announce any new interpretation thereof, and it can hardly be considered a radical departure from orthodoxy. In fact, the Rule 56(f) question and the "undeveloped NEPA claims" were a non-issue until Sierra Club-Angoon raised same in their petition for rehearing.

B. Sierra Club-Angoon Never Properly Presented, Prosecuted Or Preserved A Viable Rule 56(f) Issue

The record facts fail to support the assertion of a viable Rule 56(f) issue. Instead, that record shows that

Sierra Club-Angoon's allegation of "undeveloped NEPA claims" was never properly raised and/or that it was abandoned.

Sierra Club-Angoon's sole record basis for their "undeveloped NEPA claims" is an affidavit of counsel attached to a legal brief filed with the district court (and not otherwise brought to the attention of that court), and two isolated references to these "undeveloped" claims in the several hundreds of pages of legal and factual arguments submitted by Sierra Club-Angoon to the district court.[15]

Sierra Club-Angoon never filed a motion, nor otherwise requested the district court to defer decision on *all* NEPA issues, nor did they seek a continuance so that they could pursue Rule 56(f) discovery on their "undeveloped NEPA claims". There being no extant request for Rule 56(f) relief, the district court entered no order.

The record also shows that Sierra Club-Angoon never pursued any discovery with respect to their "undeveloped NEPA claims". There was ample opportunity for discovery from issuance of the FEIS (November 1984) to the decision of the district court on the NEPA counts (November 1985). Further, the decision to forego discovery was a tactical one, with Sierra Club-Angoon being content to rely on their "exchange alternative" argument with respect to the adequacy of the FEIS. Certiorari review does not lie to correct tactical misjudgments or litigating errors.

In its decision, the district court made clear *its* understanding that *all* of the NEPA issues had been submitted to it for determination. Likewise, the absence of mention

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[15] These two references consist of a one-sentence statement in a May 21, 1985 filing to the effect that Sierra Club-Angoon wished to challenge the FEIS on other grounds, but were not prepared to do so and a footnote reference in a June 18, 1985 filing objecting to dismissal of Sierra Club-Angoon's NEPA claims. *See* App. A at 21a, 24a n.1.

of Sierra Club-Angoon's "undeveloped NEPA claims" in their several court of appeals briefs confirms that no such issue was then extant.[16]

Thus, the record fails to support Sierra Club-Angoon's allegations of arbitrary, *sua sponte*, and unprincipled action by the court of appeals. To the contrary, the court of appeals, in directing summary judgment with respect to the adequacy of the FEIS, acted on the record developed before the district court, a record devoid of any unresolved or unlitigated NEPA issues.

There is no basis for Sierra Club-Angoon's plaints of procedural unfairness. They had ample opportunity to seek discovery and otherwise develop *all* of their NEPA claims. Sierra Club-Angoon consciously chose not to avail themselves of the discovery procedures afforded by the Federal Rules, and otherwise failed to properly utilize Rule 56 procedures; they cannot now claim a lack of opportunity to litigate.

In raising their "undeveloped NEPA claims" issue in their petition for rehearing with the court of appeals, Sierra Club-Angoon attempted to resuscitate an issue which was never properly raised or preserved before the district court, or was abandoned prior to judgment. Under these circumstances, the court of appeals was plainly correct in denying the petition for rehearing. The Federal Rules do not permit of *in pectore* pleading or practice.

C. Sierra Club-Angoon Were Not Entitled To Rule 56(f) Relief

Sierra Club-Angoon never formally sought Rule 56(f) relief before the district court. Such relief is not available for the first time on appeal.[17]

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[16] On the other hand, Shee Atika's briefs consistently represented that the only NEPA issue involved the "exchange alternative." See App. at 13a.

[17] *See* 10A C. Wright, A. Miller, M. Kane, *Federal Practice And Procedure* § 2740, at 535 (1983).

The case law developed by the lower federal courts on Rule 56(f) leaves no doubt that Sierra Club-Angoon's claims of procedural deficiencies are without legal support. First, the mere filing of a Rule 56(f) motion does not automatically stay the proceedings on the underlying motion for summary judgment.[18] A party seeking Rule 56(f) relief must diligently present and prosecute a Rule 56(f) application, since such relief is committed to the discretion of the trial court.[19] Second, the lower federal courts have accorded short shrift to litigants who fail to adequately apprise the court of their requests for Rule 56(f) relief.[20] Finally, a party who has been dilatory in discovery may not obtain Rule 56(f) relief.[21]

The Rule 56(f) claim raised on rehearing by Sierra Club-Angoon suffered from each of the deficiencies noted above. Their claim for Rule 56(f) relief was inadequately presented, and was not preserved; they took no direct action in the district court seeking a Rule 56(f) continuance or discovery; they made *no* attempt to obtain discovery on their "undeveloped NEPA claims". Thus, the court of appeals was fully warranted in denying their petition for rehearing on the ground that a Rule 56(f) issue had either never been properly raised, or had not been properly preserved, or had been abandoned. There was ample record support for each and all of the foregoing findings.

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[18] *See Gieringer v. Silverman*, 731 F.2d 1272, 1280 (7th Cir. 1984).

[19] *See United States v. Little Al*, 712 F.2d 133, 135 (5th Cir. 1983).

[20] *See, e.g., Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 926 (2d Cir. 1985); *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017 (5th Cir. 1983).

[21] *See, e.g., United States v. Bob Stofer Oldsmobile-Cadillac, Inc.*, 766 F.2d 1147, 1153 (7th Cir. 1985); *Walters v. City of Ocean Springs*, 626 F.2d 1317, 1322 (5th Cir. 1980); *Over The Road Driver's, Inc. v. Transport Ins. Co.*, 637 F.2d 816, 820-21 (1st Cir. 1980).

One final point needs to be made with respect to the spurious Rule 56(f) claim. As noted in both *Angoon I* and *Angoon II*, Sierra Club-Angoon have been successful in delaying Shee Atika's economic development of its ANSCA lands for several years.[22] For their own reasons, Sierra Club-Angoon are unalterably opposed to the policy decision made by Congress, and they have contested Shee Atika's rights in every conceivable forum and on every conceivable legal ground. Sierra Club-Angoon's new Rule 56(f) argument is but the latest stratagem in a campaign of opposition now into its twelfth year. Sierra Club-Angoon have had full opportunity to develop and present all their legal arguments, and their due process rights have been fully recognized and protected. The litigation trail and travails should end here.

CONCLUSION

For the foregoing reasons, the petition of Sierra Club-Angoon should be denied.

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June 12, 1987

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[22] *See* 749 F.2d at 1414-15; 803 F.2d at 1018-19.

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-4413, 86-3582, 86-3617, 86-3618,
DC# CV-83-234
Alaska (Anchorage)

CITY OF ANGOON, THE SIERRA CLUB, *et al.*,
Plaintiffs-Appellees,
v.
DONALD HODEL, Secretary of Interior, *et al.*,
Defendants,
and
SHEE ATIKA, INC.,
Defendant-Appellant,
and
SEALASKA CORP.,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Alaska

[Filed Nov. 22, 1986]

SIERRA CLUB/ANGOON'S PETITION
FOR REHEARING

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INTRODUCTION

Appellees Sierra Club, The Wilderness Society, and the City of Angoon ("Sierra Club/Angoon") respectfully petition for a rehearing of the appeal in the above-entitled cause, pursuant to Rule 40, Federal Rules of Appellate Procedure.

Sierra Club/Angoon believe the Court has overlooked material points of law in rendering its decision. While reserving their argued position as to each of the points of appeal, appellees address themselves in this petition solely to the issue of the propriety of the panel's entry of summary judgment in favor of Shee Atika-Sealaska on the adequacy of the Environmental Impact Statement ("EIS") and the validity of the § 404 permit for the log transfer facility ("LTF"). Specifically, appellees believe the Court erred in concluding that there were no genuine issues of material fact remaining in *sua sponte* directing summary judgment for Shee Atika-Sealaska.

SUMMARY OF FACTS

The instant controversy involves three consolidated appeals, resulting in turn from the earlier consolidation of four separate proceedings before the district court. On April 7, 1982, the Army Corps of Engineers ("Corps") issued a Department of the Army permit to Shee Atika, Inc. under § 404 of the Clean Water Act and § 10 of the Rivers and Harbors Act, authorizing the corporation to build an LTF at Cube Cove "for development of its privately-owned lands on western Admiralty Island." ER at 145.[1] On January 13, 1983 the City of Angoon and

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[1] In this petition, citations to the defendants' Excerpts of Records are in the following form: ER ——. The Sierra Club and the City of Angoon have filed joint additional Excerpts of Record in two volumes. Volume I contains excerpts from *Angoon v. Marsh*, No. A84-126 Civ. (now part of the instant consolidated action). Excerpts from Volume I are cited in the following form: *Marsh* CR

287 individual Natives filed their complaint in *Angoon v. Marsh*, alleging, *inter alia*, that approval of a § 404 permit for Shee Atika's LTF at Cube Cove without the preparation of an EIS was in violation of the federal defendants' duties pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* *Marsh* CR 1. On February 28, 1983, Sierra Club and The Wilderness Society intervened as plaintiffs, *Marsh* CR 13, and on March 21, 1983, Angoon and intervenors submitted a motion for preliminary injunction against federal approval of construction of the LTF. *Marsh* CR 20. On March 30, 1983, the federal government stipulated to suspend its earlier approval of the LTF, and to prepare an EIS. *Marsh* CR 28.

On March 22, 1984, Sierra Club/Angoon moved to enjoin construction of the permanent and timber harvesting on 40 acres of the inholding. *Marsh* CR 109. That work had begun even though federal approval was still suspended and the EIS was not yet completed. On March 28, 1984, the court granted a temporary restraining order halting construction of the LTF, but did not enjoin timber harvesting. *Marsh* CR 116. On March 28, 1984, the Corps issued a "Cease and Desist" order directing Shee Atika to halt its illegal fill activities. *Marsh* CR 114.

After expedited briefing and argument in April 1984, the court granted a preliminary injunction against timber harvesting, based on the statutory prohibition in § 503(d) of ANILCA ("[w]ithin the Monument[], the Secretary shall not permit the . . . harvesting of timber"). *Marsh* CR 168.

On December 27, 1984, the Ninth Circuit reversed the preliminary injunction. *Angoon v. Marsh*, 749 F.2d 1413

——, Tab. Volume II contains excerpts from *Angoon v. Hodel*, No. A83-234 Civ., which are cited as follows: *Hodel* CR ——, Tab ——.

(9th Cir. 1984). The case was remanded to the district court, where *Angoon v. Marsh* was consolidated with *Shee Atika v. Sierra Club I*, No. A83-209, *Shee Atika v. Sierra Club II*, No. A83-234, and *Sierra Club v. Watt*, No. A84-001. The case was renamed *Angoon v. Hodel*, No. A83-234 Civil. *Hodel* CR 58. At that time Shee Atika had pending a motion for summary judgment. This motion did not address the validity of the Corps' § 404 permit or the adequacy of the EIS.

The Corps' EIS was completed in October, 1984. ER 00136. However, the Corps did not issue its Record of Decision on the § 404 permit until February 25, 1985. ER 00325. Soon thereafter, the district court issued an order requiring Sierra Club/Angoon to file a consolidated complaint. This complaint incorporated a new claim that the § 404 permit which was issued, or about to be issued, pursuant to the Corps' February 25, 1985 decision was in violation of Sections 101 and 102 of the NEPA. The court further ordered that additional briefing on the existing summary judgment motions be filed within 30 days. (*See* Minute Order, March 4, 1985, *Hodel* CR 58, Exhibit A, attached; ER 00001, 15-16, 19.)

Upon the filing of the consolidated complaint in *Angoon v. Hodel* on April 29, 1985, ER 0001, Shee Atika and the federal defendants moved anew for summary judgment on all claims. ER 00111, 00113. On May 21, 1985, Sierra Club/Angoon filed a cross-motion for Partial Summary Judgment re: inadequacy of EIS for Failing to Study Exchange. ER 00116.[2]

As the foregoing facts demonstrate, the time period between the Corps' final decision and the submission of defendants' consolidated motions for summary judgment on all claims was extremely limited. Moreover, during this time the parties were required to prepare various

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[2] This cross-motion was subsequently resubmitted by stipulation on June 18, 1985. *Hodel* CR 140.

briefs on subsistence and other issues, pursuant to court order. *Hodel* CR 58, CR 83. For this reason, Sierra Club/Angoon cross-moved for *partial* summary judgment on the limited question of the adequacy of the EIS vis-a-vis its failure to study the alternative of a land exchange, while reserving for future consideration other violations of NEPA set forth in plaintiffs' consolidated complaint.

Because of the complicated nature of the case, the number of issues involved, the limited amount of time for discovery following the Corps' issuance of its decision, the possibility that success on plaintiffs' cross-motion for summary judgment would make a lengthy and burdensome consideration by the court of other NEPA issues unnecessary, Sierra Club/Angoon responded to Shee Atika and the federal defendants' motions for summary judgment by stating that complete resolution of all of plaintiffs' claims under NEPA was inappropriate at that time. Sierra Club/Angoon made clear that the adequacy of the EIS in light of the failure to study exchange was only one of plaintiffs' NEPA allegations, and that additional time was needed for discovery so that plaintiffs could fully present their case on these points. (Sierra Club/Angoon's Reply to Motion to Dismiss by Shee Atika and Federal Defendants, May 21, 1985, Hodel CR 119. Attached as Exhibit B.) Counsel for Sierra Club/Angoon also submitted an affidavit pursuant to Rule 56(f), Fed.R.Civ.P., requesting additional time to conduct discovery and thus opposing consideration of all EIS-related claims at that time. In support, this affidavit cited the numerous affidavits and admissions already on file which demonstrated the existence of controverted material issues of fact. (Plaintiffs' Reply In Support of Cross-Motion Summary Judgment on EIS Inadequacy Issue. Affidavit of Lewis F. Gordon, June 18, 1985, *Hodel* CR 143. Attached as Exhibit C.) Because the district court granted plaintiffs' cross-motion for par-

tial summary judgment, counsel's 56(f) affidavit and the other claims to which it related were never ruled upon below. *See* ER 00045, 00053-65; *Hodel* CR 146.

ARGUMENT

In reviewing the grant or denial of summary judgment, the appellate court is faced with the same task and governed by the same standard as that before the district court. *Jewel Companies v. Pay Less Drug Stores Northwest*, 741 F.2d 1555, 1559 (9th Cir. 1984). The court must determine, "on the basis of the pleadings, affidavits, depositions and other evidence available at the time the motion was made," whether there are any genuine issues of material fact and whether either party is entitled to prevail as a matter of law. *Jewel*, 741 F.2d at 1559; Fed.R.Civ.P. 56(c). The appellate court's review is to be *de novo* (*State of Alaska v. United States*, 754 F.2d 851, 853 (9th Cir. 1985), *cert. denied*, 016 S.Ct. 333 (1985); *Callahan v. Woods*, 736 F.2d 1269, 1272 (9th Cir. 1984)), and all evidence, facts, and inferences that can be drawn from the depositions, admissions, and affidavits on file must be viewed in the light most favorable to the party opposing summary judgment (*Aronsen v. Crown Zellerbach*, 662 F.2d 584, 591 (9th Cir. 1981), *cert. denied*, 459 U.S. 1200 (1983); *Spectrum Financial Companies v. Marconsult, Inc.*, 608 F.2d 377, 380 (9th Cir. 1979), *cert. denied*, 466 U.S. 936 (1980)).

As Judge Sneed has previously noted, the granting of summary judgment is appropriate only where there is *no* genuine issue as to any material fact. *Hutchinson v. United States*, 677 F.2d 1322, 1325 (9th Cir. 1982). In making this determination, the court has a duty to consider the record as a whole (*John v. State of Louisiana*, 757 F.2d 698, 711-712 (5th Cir. 1985)) including documentary evidence previously submitted to the court (*Friends of the Earth v. Facet Enterprises, Inc.*, 618 F.Supp. 532, 535 (D.N.Y. 1984)). The appellate

court, like the trial court, is precluded from resolving factual disputes on motion for summary judgment (*New York Life Insurance Co. v. Baum*, 707 F.2d 870, 871-72 (5th Cir. 1983)), and cannot "weigh the evidence, pass upon credibility, or speculate as to the ultimate findings of fact" (*Aronsen*, 662 F.2d at 591). Rather the court must resolve all doubts in favor of the party opposing summary judgment (*F.S. Smithers & Co., Inc. v. Federal Insurance Company*, 631 F.2d 1364, 1366 (9th Cir. 1980)), including doubts about the existence of a genuine issue of material fact (*Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976) (citing Moore's *Federal Practice* ¶ 56.15(3) (1974) and citations therein)). *See also Lemelson v. TWR, Inc.*, 760 F.2d 1254, 1260-61 (Fed. Cir. 1985).

Under these well-established principles, the granting of summary judgment for Shee Atika-Sealaska on the adequacy of the EIS and the validity of the § 404 permit for the Cube Cove LTS was improper. In light of the procedural posture of the case, as discussed above, it becomes clear that upon reversing the district court's grant of summary judgment for Sierra Club/Angoon, the appellate court erred in failing to remand the case for further proceedings necessary to resolve the issues remaining.

Under 28 U.S.C. § 2106, appellate courts are granted broad powers to dispose of a case upon appeal. *MGPC, Inc. v. Dept. of Energy*, 763 F.2d 422, 433-34 (TECA 1985), *cert. denied*, 106 S.Ct. 76 (1985). Despite the fact that a party may have moved for summary judgment in the court below, § 2106's broad grant of authority allows an appellate court to direct the entry of summary judgment in favor of a non-moving party when justice requires. *Id.*; *Martinez v. United States*, 669 F.2d 568, 570 (9th Cir. 1982); *MGPC*, 763 F.2d at 434. The exercise of this power, however, is appropriate "only in the rare case" (*E. C. Ernst, Inc. v. General Motors*

Corp., 537 F.2d 105, 109 (5th Cir. 1976)), "since such a determination is best left to the trial court. . . ." (*MGPC*, 763 F.2d at 434). Entry of summary judgment by an appellate court is therefore appropriate only "when it would be just under the circumstances" (*id.*), such as when "it is very clear that all material facts are before the reviewing court" (*Ernst*, 537 F.2d at 109), and no purpose would be served by remanding the issue to the district court (*Shaw v. FBI*, 749 F.2d 58, 63 (D.C.Cir. 1984)). This is not such a case.

As Judge Sneed has cautioned, "[w]e are mindful too that summary judgment procedures should be used with care and restraint." *Hutchinson*, 677 F.2d at 1325. This caution is apt, because "the court must keep in mind that the entry of summary judgment terminates the litigation, or an aspect thereof" (*Jones v. Howe Military School*, 604 F.Supp. 122, 124 (D.Ind. 1984)), and "an improvident grant may deny a party a chance to prove a worthy case" (*Lemelson*, 760 F.2d at 1260 (quoting *D.L. Auld Co. v. Chroma Graphics Corp.*, 714 F.2d 1144, 1146 (Fed.Cir. 1983))).

Thus, entry of summary judgment by the appellate court should occur only when it is absolutely clear that there are no genuine issues of fact and the parties have had a full and fair opportunity to raise disputed issues of fact, counter the evidence submitted by an adversary, and present their case. *MGPC*, 763 F.2d at 434; *Callahan*, 736 F.2d at 1275; *Martinez*, 669 F.2d at 570; *Ithaca College v. N.L.R.B.*, 623 F.2d 224, 229 (2nd Cir. 1980) (quoting 6 Moore's *Federal Practice* ¶ 56.12 at 334 (1976)), *cert. denied*, 449 U.S. 975 (1980); *Ernst*, 537 F.2d at 109. Where there are issues most properly left to the trial court, the appropriate course is to reverse the entry of summary judgment and remand the matter to the district court for further proceedings. *Jewel Companies*, 741 F.2d at 1567; *Callahan*, 736 F.2d at 1269; *Suskind v. North American Life & Casualty Co.*, 607

F.2d 76, 84 (3rd Cir. 1979). *See, e.g., Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1608, 1075 (1st Cir. 1980) (district court is in better position to examine sufficiency of EIS with aid, if necessary, of further briefs).

These principles are no less applicable where the parties have filed cross-motions for summary judgment. *See Smithers*, 631 F.2d at 1366 (in case involving cross-motions for summary judgment, Ninth Circuit states that moving party must demonstrate absence of issues of material fact and entitlement to judgment as matter of law, with evidence and inferences viewed favorably to opposing party and all doubts resolved in opposing party's favor); *Callahan*, 736 F.2d at 1275 (in case involving cross-motions for summary judgment, Ninth Circuit declines to grant summary judgment for appellate because appellee would be unfairly deprived of opportunity to present pertinent evidence). Although for purposes of his or her own motion for summary judgment a party may submit an affidavit stating that there are no disputed issues of fact and that summary judgment should be granted, this admission applies only to the legal theory on which the party has submitted such motion, but does not constitute a waiver of the party's right to raise disputed issues of fact with regard to an adversary's contentions:

> "A party moving for summary judgment . . . may make certain concessions in favor of his adversary for the purposes of the motion that do not carry over and support summary judgment for the adversary."

Ernst, 537 F.2d at 109 (quoting Moore, 6 *Federal Practice* ¶ 56.12 at 56-337 (1976). *See also John*, 757 F.2d at 705; 10A Wright, Miller and Kane, *Federal Practice and Procedure*, Civil, § 2720 at 20-22 (1983).

Thus, the court, whether at the trial or appellate level, must review each party's motion independently and deter-

mine whether that party has met the strict burden of demonstrating that there are no disputed issues of material fact and that judgment is appropriate on those claims as a matter of law. *United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978); *Lee v. Dayton Power and Light Co.*, 604 F.Supp. 987, 993 (D. Ohio 1985); *District 12, United Mine Workers of America v. Peabody Coal Co.*, 602 F.Supp. 240, 242 (D.Ill. 1985). The court must take care to ensure that in considering cross-motions for summary judgment, one or the other of the parties is not deprived of its opportunity to be heard on other issues. *Levine v. Fairleigh Dickinson University*, 646 F.2d 825 (3rd Cir. 1981). In reversing a lower court's grant of summary judgment, the appellate court must therefore decline to enter summary judgment for the opposing party if a genuine issue of fact exists (*John*, 757 F.2d at 705; *Fred A. Arnold*, 573 F.2d at 606), and should instead remand the case for resolution of those issues which the district court did not pass upon in its initial determination (*Hettleman v. Bergland*, 642 F.2d 63, 68 (4th Cir. 1981); *Grazing Fields*, 626 F.2d at 1074-75; *Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729, 734-35 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979)).

The principles outlined above are particularly applicable here. In moving for partial summary judgment, plaintiffs Sierra Club/Angoon specifically limited their motion to consideration of whether the Corps was required to study a land exchange as a reasonable alternative to the LTF and related harvesting. If, as eventually happened, that motion was granted, a complicated trial on other NEPA issues, requiring the testimony of expert witnesses, could be avoided, and both the court and the parties could be saved considerable, and avoidable, delay and expense.

As stated both in their response to defendants' consolidated motions for summary judgment (*see* Exhibit B)

and in the affidavit submitted pursuant to Rule 56(f) (*see* Exhibit C), plaintiffs believed that substantial factual disputes relating to their other NEPA claims existed, but because of the limited time for discovery, they were unable to fully document these facts in opposition to defendants' motions. Plaintiffs also noted that genuine issues of material fact were raised by the affidavits previously submitted with regard to earlier stages of the proceeding. As noted above, the court must make a determination of whether a genuine issue of fact exists of the basis of the record as a whole (*John*, 757 F.2d at 711-12), and documentary evidence already in the record is to be considered (*Friends of the Earth*, 618 F.Supp. at 535). Plaintiffs' declarations, together with the surrounding circumstances, compel the conclusion that genuine issues of fact existed concerning the validity under NEPA of Shee Atika's § 404 permit for reasons other than the EIS' failure to study the exchange alternative, and the awarding of summary judgment in favor of Shee-Atika-Sealaska was therefore inappropriate.

As previously discussed, summary judgment procedures must be used cautiously, so as not to deprive a party of a fair opportunity to be heard. *Hutchinson*, 677 F.2d at 1325. *See Fountain v. Filson*, 336 U.S. 681 (1949) (*sua sponte* entry of summary judgment by court of appeals was error, because it deprived party against whom judgment was entered opportunity to dispute facts material to that claim). For this reason, the Federal Rules allow for situations, such as that presented here, where additional time is needed in order to allow the opposing party a fair opportunity to present its case. *Alghanim v. Boeing Company*, 477 F.2d 143, 148 (9th Cir. 1973); *Argus Inc. v. Eastman Kodak Co.*, 552 F. Supp. 589, 600 (D.N.Y. 1982).

> "The purpose of the rule is to prevent premature grants of summary judgment in cases where, given

> adequate time to obtain discoverable material from the moving party, the party opposing the motion might be able to establish genuine issues of fact which would preclude summary judgment." (*McVan v. Bolco Athletic Co.*, 600 F.Supp. 375, 378 (D.Pa. 1984).)

As with other affidavits submitted in opposition to a motion for summary judgment, an affidavit submitted pursuant to Rule 56(f) "should be treated liberally" (*Patty Precision v. Brown & Sharpe Manufacturing Co.*, 742 F.2d 1260, 1264 (10th Cir. 1984)), and appropriate relief (either a continuance or denial of the summary judgment motion) should be granted "almost as a matter of course" (*McVan*, 600 F.Supp. at 378 (quoting *Ward v. United States*, 471 F.2d 667, 670 (3rd Cir. 1973)); *Costlow v. United States*, 552 F.2d 560, 563-64 (3rd Cir. 1977)).

> "Further, as an additional precaution against denying a party its chance to prove a worthy case, any doubt as to the presence or absence of disputed issues of material fact must be resolved in favor of the presence of disputed issues, or in other words in favor of the party opposing summary judgment." (*Lemelson*, 760 F.2d at 1261 (citations omitted); *Hector v. Weins*, 533 F.2d 429, 432 (9th Cir. 1976); *Doff v. Brunswick Corp.*, 372 F.2d 801, 804 (9th Cir. 1967), *cert. denied*, 389 U.S. 820.)

Without an opportunity to gather relevant information through discovery, or at the very least to submit affidavits presenting such disputed facts as can be established by the information already on hand, Sierra Club/Angoon will have been deprived of their opportunity to be heard. It is important to note that plaintiffs were given no notice of the fact that the appellate court intended to issue a final ruling on *all* NEPA claims. *See Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984) (court must

afford party against whom *sua sponte* summary judgment is to be entered notice and opportunity to respond). Pertinent facts and legal arguments pertaining to other defects in the Corps' EIS and resulting § 404 permit were neither presented in the parties' briefs nor argued before the panel. Both Sealaska and the Federal Defendants stated in their opening briefs that the question presented was whether the EIS was required to give detailed consideration to the alternative of exchange and the parties' NEPA appeals were clearly based only on that part of the district court's Nov. 27, 1985 ruling prohibiting issuance of a permit for construction of the LTF until the exchange alternative was explored. While Shee Atika's statement of the issues is somewhat convoluted, Shee Atika's briefs deal only with the exchange alternative issue. The Court's misunderstanding about the existence of disputed facts is perhaps understandable, however, because of the misleading statements put forth by Shee Atika. For instance, in its Opening Brief at 13 Shee Atika states (erroneously) that "[t]he only contention advanced by Sierra Club was that the Corps had violated NEPA by not conducting an in-depth study of exchange. Sierra Club did not challenge in any manner the environmental findings of the Corps." Opening Brief For Shee Atika, Inc., Excerpts Attached as Exhibit D. In its brief, Shee Atika repeatedly refers to "dispositive motions" submitted by the parties. This misleading characterization of the facts with likewise presented to the Court in Shee Atika's December 6, 1985 Motion for Summary Reversal, in which Shee Atika alleged to the Court that "the *only* dispute concerning the legal adequacy of the EIS is whether it sufficiently addressed the alternative of an off-island exchange." Attached as Exhibit E.; emphasis in original.

As this Court has noted, "[I]n passing upon requests for additional time to respond to a motion for summary judgment . . . the absolute right of a party to respond,

must be taken into consideration." *Alghanim*, 477 F.2d at 148. Here Sierra Club/Angoon have not been granted a fair opportunity to respond. Because the district court granted plaintiffs' cross-motion for summary judgment, thus invalidating the Corps' EIS, the Rule 56(f) motion was never passed upon. The district court thus never had the opportunity to exercise the discretion appropriately entrusted to it when a party files an affidavit under Rule 56(f) (*Patty Precision*, 742 F.2d at 1264-65), and plaintiffs were deprived of their entitlement of a ruling on their objection before the court disposed of the entire case (*Yashon*, 737 F.2d at 552-53). "Even if the plaintiff were incorrect in arguing that the record was insufficient, he was entitled to be so informed in order that he might respond to the district court's proposal to grant summary judgment with whatever arguments and evidence in the record he could muster." *Id.* at 552; *Costlow*, 552 F.2d at 564. Without the benefit of either additional evidence that could be presented upon further discovery or submission of a formal response based on the evidence the party opposing summary judgment already has, the court is hampered in its ability to determine that summary judgment is truly appropriate. *MGPC*, 763 F.2d at 428; *Sharlitt v. Gorinstein*, 535 F.2d 282, 283-84 (5th Cir. 1976); *Macklin v. Butler*, 553 F.2d 525, 528 (7th Cir. 1977).

CONCLUSION

Almost thirty years ago the Supreme Court cautioned that parties facing a *sua sponte* grant of summary judgment must be given an opportunity to dispute the facts and present their case. *See Fountain v. Filson*, 336 U.S. 681 (1949). In more recent times, the courts of appeal have noted that a party should not be required "to needlessly confuse the issues of a case and additional burdens to the workload of the trial court when the correct disposition of the matter merely requires the court to rule

on the motions pending before it." *Patty Precision*, 742 F.2d at 1265. Here plaintiffs properly tendered their objection to final disposition on their NEPA claims without the benefit of further time for discovery. Their allegations of disputed issues of facts must be treated liberally and all doubts must be resolved in their favor. The court below has neither passed on this objection nor afforded plaintiffs an opportunity to make such arguments as they might. Evidence already in the record demonstrates that material issues of fact are disputed by the parties. Arguments pertaining to other aspects of the parties' compliance with NEPA were not briefed or argued before this Court. For all of the foregoing reasons, the entry of summary judgment for Shee Atika-Sealaska on the validity of the EIS and the § 404 permit for the LTF was in error, and the case should be remanded to the district court for trial on the issues remaining.

Respectfully submitted.

FURTH, FAHRNER, BLUEMLE
& MASON
SIERRA CLUB LEGAL
DEFENSE FUND

By /s/ Jeffrey A. Glick
JEFFREY A. GLICK

DATED: November 19, 1986

By /s/ Durwood J. Zaelke
DURWOOD J. ZAELKE

DATED: November 19, 1986

EXHIBIT A

MINUTES OF THE
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Case No. A83-134 Civ.
The HONORABLE JAMES VON DER HEYDT

SHEE AKITA, INC.

v.

SIERRA CLUB, INC., et al.

Deputy Clerk	*Reporter*
___ Jim Meyers	___ Dolores Runner
X Colleen Cannon	___ Janis Roller
___ Ida Romack	___ _____
___ _____	

APPEARANCES: PLAINTIFF:

DEFENDANT:

PROCEEDINGS: MINUTE ORDER FROM CHAMBERS:

The motion of the City of Angoon, the Angoon Community Association and the Native residents of the City of Angoon to intervene is granted. The clerk shall file the proposed answer lodged with the court. *See* Docket #29.

Sierra Club's motion to join the United States as a party is granted, and accordingly it is ordered that the United States be joined as a party to this action. The

motion to join the Angoon Village Association is denied as moot. *See* Docket #31.

The United States' motion to file an amicus brief, Docket #37, is granted.

Sierra Club's motion for leave to file a supplemental brief, Docket #49 is granted.

Sierra Club's motion to consolidate A83-A234, A84-001, A84-126 and A83-20 is granted. The court finds all the cases involve overlapping issues, but involve different parties. The court finds it will promote fairness and judicial economy to allow all interested parties to brief an issue prior to the court reaching that issue on the merits. Sierra Club and Angoon shall be aligned as party plaintiffs; the United States and its agencies and Shee Atika shall be aligned as party defendants. Plaintiffs shall file an amended complaint consolidating all issues within 30 days of the date of this order defendants shall present all claims in their answer and counterclaim to the consolidated amended complaint. All subsequent filings shall be in the above action, A83-234.

Plaintiff's motion for scheduling of joint oral argument, Docket # 51, is denied as moot.

The court finds all parties who have not filed briefs on the issues except the subsistence issues, raised in Shee Atika's motion for summer judgment should have an opportunity to do so prior to court action on the motion. Accordingly, it is ordered that any additional primary briefs on the issues raised in that motion shall be filed within 30 days of this order; all reply briefs shall be filed within 15 days thereafter.

However, the court finds that all parties have had an adequate opportunity to brief the subsistence issues raised by Shee Atika in A84-126, and argued before this court April 20, 1984. Unless objection is heard within 15 days from the date of this order, the court will consider

the subsistence issues ripe for decision based on the briefs currently submitted in A84-126 and A83-234.

DATED March 4, 1985

cc: Middleton, Gordon, Landon

INITIALS: [Illegible]
Deputy Clerk

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A83-234 Civil
(Consolidated)

SHEE ATIKA, INC.,

Plaintiff,

vs.

SIERRA CLUB, INC.,

Defendant.

[Filed May 21, 1986]

REPLY TO MOTION TO DISMISS
BY SHEE ATIKA AND FEDERAL DEFENDANTS

INTRODUCTION

This responsive brief addresses the motions to dismiss by Shee Atika and Federal Defendants.[1] It addresses the issues order raised by Shee Atika. Separate reply briefs are being filed on § 22(k), and the EIS (the issue that failure to study the land exchange alternative makes the EIS inadequate).

ARGUMENT

1. *Section 22(k) ANCSA*

This issue is addressed in the separate reply brief submitted this same date.

2. *Section 17(b) ANCSA*

Angoon/Sierra Club state a claim under § 17(b) of ANCSA, as applied to Shee Atika's conveyance under § 506(c)(2) of ANILCA. Section 17(b) requires the Secretary of Interior to reserve in any Native conveyance such easements as the Secretary of Agriculture determines are necessary "to insure that the larger public interest is protected." Conf. Com. Rep. No. 746, 92nd Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Admin. News 2247-49; Solicitor's Opinion 82 I.D. (No. 7) 325 (July 8, 1975). This mandatory duty includes but is not limited to, "a full right of public use and access for recreation, [and] hunting. . . ." § 17(b)(1). *See also Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664 (D. Alaska 1972).

The scope of the "larger public interest" protected by the easements was determined by Congress, for Admiralty

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[1] Although Federal Defendants' Motion is entitled Motion for Summary Judgment, most of their arguments focus on whether plaintiffs' complaint states claims for which relief may be granted. The issues whose merits they discuss at greater length have received correspondingly more detailed treatment here and in plaintiffs' other briefs filed this same date.

Island and the Cube Cove lands, in § 101 (general protective policy for wilderness and subsistence), § 503(c) (mandatory duty to protect Admiralty), § 503(d) (mandatory duty to prohibit timber harvesting), § 506(a)(2) (mandatory duty to ensure that nothing

6. *Sections 101 and 102 of NEPA*

The EIS violates NEPA sections 101 and 102 by, *inter alia*, failing to consider the alternative of a land exchange. This issue is addressed in one of Angoon/Sierra Club's separate reply briefs submitted this same date. Plaintiffs allege that the EIS is inadequate for other reasons as well, but until they have the opportunity for further factual development, including discovery, and further legal analysis, plaintiffs are not prepared to present their case on these points.

7. *Due Process Clause*

Defendants assert that Angoon/Sierra Club fail to state a claim that the Secretary's decision to convey Admiralty lands to Shee Atika violated the due process clause of the Constitution. They present three bases for this assertion: 1) the contacts between Shee Atika and the Secretary of Interior were made pursuant to regulation, Fed. Defendants Brief at 6; 2) even if the *ex parte* contacts were improper, Angoon/Sierra Club cannot claim a due process violation because they were not deprived of a protected property interest, Fed. Defendants Brief at 7; and 3) Angoon/Sierra Club's due process claim was mooted by § 315 of Public Law 97-394. Shee Atika Brief at 24. As shown below, each of these arguments is without merit.

Federal defendants suggest that Shee Atika complied with the procedure of 43 C.F.R. § 4.5 when it urged then-Secretary of Interior Watt to personally assume jurisdiction over the Shee Atika conveyance appeal. *See* letters of Shee Atika attorney Richard A. Baenen to Secretary James G. Watt, attached

III. CONCLUSION

For the foregoing reasons, defendants' Motions to Dismiss and for Summary Judgment should be denied.

Respectfully submitted,

FURTH, FAHRNER, BLUEMLE & MASON
BAILY & MASON
SIERRA CLUB LEGAL DEFENSE FUND, INC.

/s/ Durwood J. Zaelke
By: DURWOOD J. ZAELKE
Attorneys for Plaintiffs

DATE: 5/21/85

The undersigned hereby certifies that on the 21st day of May, 1985, the attached documents were mailed to the attorneys of record.

/s/ Debbie Traver

Subscribed and sworn to before me the date last above written.

/s/ Teresa M. Torres
Notary Public
My Commission expires 3/22/89

EXHIBIT C

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Attorneys for City of Angoon
and Sierra Club

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A83-234 Civil
(CONSOLIDATED)

SIERRA CLUB, INC., *et al.*,
Plaintiffs,
v.
SHEE ATIKA, INC., *et al.*,
Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT ON EIS INADEQUACY ISSUE

INTRODUCTION

This memorandum is a reply to federal defendants' and Shee Atika's responses, filed June 10, 1985, to plaintiffs' Cross Motion for Partial Summary Judgment re Inadequacy of EIS for Failing to Study Exchange Alternative, originally filed May 21, 1985, and resubmitted by stipulation on June 18, 1985.[1]

ARGUMENT

1. *Defendants Do Not Dispute That the Law Requires a Broad Definition of the Timber Project, That Alternatives Must Be Addressed to the Larger Project, and That the EIS Contains No Such Alternatives.*

Federal defendants and Shee Atika (collectively "defendants") do not dispute that the authorities cited by plaintiff compel both a broad definition of Shee Atika's project on Admiralty, and a discussion of reasonable alternatives to that broadly defined project. Nor do defendants dispute that the EIS contains no such alternatives to the timber harvest operation as a whole.

As discussed in plaintiffs' memorandum in support of the cross motion filed May 21 ("EIS Memorandum"), Corps regulations require an extremely broad definition of the public purpose of a project. 33 CFR Part 230, App. B, 11b(4). If an alternative in this particular case is "remote and speculative." However, Shee Atika's and the federal defendants' definition of "remote and speculative" would make it unlikely that *any* alternative to the proposed timber operation as a whole would be considered in the EIS. The law requires the Corps to

[1] Plaintiffs oppose federal defendants' attempt to obtain summary judgment on *all* potential claims regarding the adequacy of the Corps' EIS. Plaintiffs cannot at this time present by affidavit facts justifying this opposition, since no discovery on additional inadequacy issues has been conducted. Plaintiffs submit an affidavit pursuant to Federal Rules of Civil Procedure 5B(8), attached hereto, in support of their opposition.

consider alternatives to the broader timber harvesting project, not just to log transport, and to consider alternate locations for the project. Timber harvesting *at another location off-Admiralty* is one of the few alternatives plaintiffs know of that would satisfy the project's broad purposes of increased timber production in Southeast and increased revenues for Shee Atika shareholders. Defendants should not be able to use the "remote and speculative" test to circumvent the explicit requirements of the Corps regulations and NEPA case law regarding the scope and content of the required alternatives. The Corps *must* consider alternatives to the entire project, including alternate locations, and discussing the exchange option is an obvious, straightforward and reasonable way to meet this obligation.

Dated: June 18, 1985

Respectfully submitted,

FURTH, FAHRNER, BLUEMLE & MASON
BAILY & MASON
SIERRA CLUB LEGAL DEFENSE FUND

/s/ Lewis F. Gordon
LEWIS F. GORDON

/s/ Durwood Zaelke
DURWOOD ZAELKE
Attorneys for Plaintiffs

The undersigned hereby certifies that on the 18th day of June, 1985, the attached documents were mailed to the attorneys of record.

/s/ Debbie Traver

Subscribed and sworn to before me the date last above written.

/s/ [Illegible]
Notary Public
My Commission expires 7/25/85

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Attorneys for City of Angoon
and Sierra Club

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A83-234 Civil
(CONSOLIDATED)

SIERRA CLUB, INC., *et al.*,
Plaintiffs,

v.

SHEE ATIKA, INC., *et al.*,
Defendants.

AFFIDAVIT OF LEWIS F. GORDON

I, Lewis F. Gordon, being duly sworn, depose and say as follows:

1. I am legal counsel for the Sierra Club and the City of Angoon in the above-referenced action. I submit this affidavit pursuant to Federal Rules of Civil Procedure 56(f) in support of Plaintiffs' Reply in Support of Cross Motion for Partial Summary Judgment on EIS Inadequacy Issue filed this same date.

2. Plaintiffs cannot at this time, for reasons stated below, present by affidavit facts essential to justify their opposition to defendants' motion for summary judgment on plaintiffs' claims regarding the inadequacy of the Corps' EIS on the log transfer facility.

3. Plaintiffs have not commenced any discovery on the issue of tne inadequacy of the EIS for the following reasons.-

4. First, the Corps did not issue its Record of Decision on the 404 permit until February 25, 1985, and the consolidated complaint, filed pursuant to court order and raising the issue of the inadequacy of the EIS for the first time, was not filed until April 29, 1985. In this short period of time, plaintiffs' counsel has been extremely busy on other aspects of this litigation, preparing various briefs on subsistence and other issues pursuant to the court's briefing schedules. There has been very little time for preparation of discovery requests and for scheduling and taking depositions.

5. Second, plaintiffs believe that success on their cross motion for partial summary judgment on the inadequate alternatives issue would make further discovery on other NEPA issues unnecessary. In the interest of avoiding potentially unnecessary discovery and litigation costs, plaintiffs have put off discovery until after resolution of their Cross Motion for Partial Summary Judgment re Inadequacy of EIS for Failing to Study Exchange Alternative.

6. Plaintiffs' discovery plan regarding the inadequacy of the EIS would in part include the following: (1)

request production of all drafts of the EIS, related documents, and comments submitted; (2) have plaintiffs' experts analyze these materials; (3) take depositions of preparers and commentators, especially representatives of state and local governments; (4) have plaintiffs' experts analyze deposition testimony.

6. Even though formal discovery has not been commenced regarding the inadequacy of the EIS, affidavits previously submitted in this lawsuit by experts and subsistence users regarding the subsistence issues show that there are contested issues of fact with regard to the environmental and subsistence effects of the project. Defendants have admitted that these issues of fact are in dispute. See, e.g., Shee Atika's Supplemental Brief on Subsistence Issues, filed April 18, 1985, at 2, n.2. These affidavits suggest potential triable issues of fact regarding the adequacy of the EIS which will be further explored during the discovery process.

/s/ Lewis F. Gordon
LEWIS F. GORDON

SUBSCRIBED AND SWORN to before me this 18th day of June, 1985.

/s/ Deborah A. Traver
Notary Public in and for Alaska
My commission expires: 8/17/86

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-4413, 86-3582, 86-3617, 86-3618

CITY OF ANGOON, *et al.*,
Plaintiffs-Cross-Appellants,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Defendants,

and

SHEE ATIKA, INC.,
Defendant-Appellant,

and

SEALASKA, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Alaska

OPENING BRIEF FOR SHEE ATIKA, INC.

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Attorneys for Appellant
Shee Atika, Inc.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-4413, 86-3582, 86-3617, 86-3618

CITY OF ANGOON, *et al.*,
Plaintiffs-Cross-Appellants,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Defendants,

and

SHEE ATIKA, INC.,
Defendant-Appellant,

and

SEALASKA, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Alaska

OPENING BRIEF FOR SHEE ATIKA, INC.

ISSUES PRESENTED

In satisfaction of the Federal Government's obligations under the Alaska Native Claims Settlement Act of 1971, Congress directed the conveyance of specific lands

to Shee Atika. Prior judicial rulings (including one from this Court) established that this conveyance was for the economic betterment of Shee Atika and that the lands could be developed, and that this was clearly intended and provided by Congress. Given the foregoing background, the controlling questions presented by this appeal are as follows:

I. Whether the District Court correctly interpreted and applied NEPA in deciding that NEPA required the Corps of Engineers, in the course of its EIS review for a federal permit under Section 404 of the Clean Water Act, to reexamine the policy decision regarding development of the Shee Atika conveyance.

II. Whether NEPA can properly be construed to permit a federal agency or reviewing court to impede or prohibit development on private lands when it has been concluded that the federal action under review will have no adverse environmental effects, and where the sole justification for permit denial is the view of the federal agency or reviewing court that the private lands should not be developed.

III. Whether NEPA authorizes denial of a federal permit in an instance where it is established that (i) the federal action under review will have no significant adverse effects on the environment, (ii) the related private activity (to be conducted on private lands) will likewise have no such effects, and (iii) where the sole basis for denial is the perception of the federal agency (or reviewing court) that another use should be made of the private lands.

STATEMENT OF THE CASE

This is an interlocutory appeal of an injunction entered by the United States District Court for the District of Alaska on November 27, 1985, the injunction becoming effective on December 11, 1985. Excerpts of Record ("ER") 45.

A. *Jurisdiction of the District Court*

Jurisdiction was properly vested in the District Court pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1361.

B. *Jurisdiction of the Court of Appeals*

The jurisdiction of this Court is founded upon 28 U.S.C. § 1292(a)(1) which confers appellate jurisdiction with respect to "interlocutory orders of the District Courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions. . . ."

C. *Appealability of Order*

The Order which is the subject of this appeal is an injunction. Under the provisions of 28 U.S.C. § 1292 (a)(1), an interlocutory appeal lies with respect to an order granting an injunction.

D. *Timeliness of Appeal*

The injunction order was entered on November 27, 1985, with the injunction becoming effective on December 11, 1985. Shee Atika's notice of appeal was filed on December 13, 1985. ER 130. The notice was timely under 28 U.S.C. § 2107.

The Consolidated Complaint herein was filed effective April 29, 1985. ER 1. Subsequently, the parties filed dispositive motions and cross-motions on the claims raised in the Consolidated Complaint. ER 108, 110, 111, 113, 114, 116. The District Court disposed of most of the issues raised in these dispositive pleadings with a series of three orders. The first two orders were issued on October 17, 1985. One of these orders was captioned "Memorandum and Order on Subsistence and Trust Responsibility Issues" (ER 72), and the second was captioned "Memorandum and Order on Section 22(k)" (ER 93). On November 27, 1985, the District Court entered an order captioned "Memorandum and Order on Remain-

ing Issues Raised in Consolidated Complaint." ER 45. The November 27, 1985 Order is the subject of the appeal filed by Shee Atika (No. 85-4413). Subsequently, on December 27, 1985 the District Court issued a Partial Final Judgement, pursuant to Rule 54(b), in conformance of the three Memoranda/Orders earlier entered by the District Court. ER 66. Appeals have been taken from the Partial Final Judgment by the other parties hereto (Nos. 86-3852, 86-3617, 86-3618). All of the appeals were consolidated by order dated March 31, 1986.

On December 5, 1985, Shee Atika filed a motion in the District Court seeking reconsideration of the November 27 injunction order. ER 118. That motion was summarily denied by the District Court on December 6. Clerk's Record ("CR") 173. Notice of appeal from the November 27 injunction was filed by Shee Atika on December 13. ER 130. On December 17, 1985, Shee Atika filed a Motion for Summary Reversal of District Court Order and Injunction with this Court. (U.S.C.A. No. 85-4413). That motion was denied by the Court by order dated April 2, 1986.

> forcing Shee Atika to accept exchange proposals it would otherwise refuse cannot be deemed a proper alternative. An exchange, if implemented, could result in withdrawal of the requested modification to the permit by the permittee and no permit would be issued (Corps Alternative 1). Upland activities which could occur without a Corps permit would be unlikely to continue. [ER 152-53.]

After completing its careful environmental review, the Corps concluded that the construction/operation of Shee Atika's log transfer facility would have no significant adverse effects on the environment. Subsequently, the Corps of Engineers rendered its decision to issue a Section 404 permit to Shee Atika for construction of its log transfer facility. ER 325. The Corps found that the proposed work was in the public interest and in accord

with all applicable laws and regulations. The Record of Decision prepared by the Corps also incorporated a number of required environmental protection conditions, to further minimize impacts on the environment. *Ibid.*

Following issuance of the Record of Decision and issuance of a Section 404 permit to Shee Atika, Sierra Club-Angoon filed a dispositive motion seeking invalidation of the permit for alleged violation of NEPA requirements. The only contention advanced by Sierra Club-Angoon was that the Corps had violated NEPA by not conducting an in-depth study of the land exchange "alternative." Sierra Club-Angoon did not challenge in any manner the environmental findings of the Corps.

After the District Court consolidated all of the litigation relating to the Shee Atika conveyance, the parties filed a flurry of dispositive motions seeking summary judgment on most of the claims raised by Sierra Club-Angoon. On October 17, 1985, the District Court entered two Memoranda/Orders, ruling on many of the claims. In one of these Memoranda/Orders, the District Court dismissed Sierra Club-Angoon's claim that Shee Atika was statutorily barred from developing its Admiralty Island lands. ER 72. In dismissing this claim and rejecting the Sierra Club-Angoon contention that Congress had made the conveyance to Shee Atika for exchange purposes only, the District Court made the following findings:

> Congress never intended to force Shee Atika into an exchange that was not voluntary on both sides. [ER 78.]
>
> It is not credible to believe that Congress could intend to deprive Shee Atika of any economic use of its lands, thereby depriving Shee Atika of much of its bargaining power and forcing an exchange, without making some mention of that intent in the legislative history. [ER 81.]

> Congress . . . intended that any such exchange be voluntary on both sides. Therefore, Section 506(c) grants Shee Atika full economic and beneficial use of its lands, subject of course to the valid existing rights and easements referred to in that section. [ER 83-84.]
>
> [T]he court finds that Congress did not intend to compel any exchange. [ER 84.]
>
> The court declares that the lands conveyed to Shee Atika on .December 9, 1981, pursuant to Section 506(c) of ANILCA, are "Settlement Act Lands" that may be developed commercially by [Shee Atika] . . . ER 92.

One month later, the District Court issued a third Memorandum/Order in which it disposed of the remaining issues raised by the parties. ER 45. One of the claims ruled on in that Memorandum/Order was Sierra Club-Angoon's claim that the EIS was defective for failure to consider the land exchange alternative. In a surprising turnabout, the District Court ruled in Sierra Club-Angoon's favor, holding that NEPA required the Corps of Engineers to evaluate the merits of the exchange alternative.[12] The District Court thereupon invalidated the Section 404 permit issued to Shee Atika and enjoined Shee Atika "from all use of the Cube Cove Log Transfer Facility until a valid § 404 permit has been obtained." ER 65. The rationale for the District Court's holding was expressed as follows:

> Because it would be proper for the Corps to deny a permit on the basis that a fair off-island exchange would better serve the public interest, it would be proper for the Corps to evaluate an off-island exchange as an alternative in the EIS. [ER 62.]

On December 5, 1985, Shee Atika filed a motion for reconsideration, with supporting memorandum, with the

---

[12] In each of the several other rulings made by the District Court on the claims raised by Sierra Club-Angoon, it ruled in favor of Shee Atika and the other defendants.

District Court. ER 118. In that filing, Shee Atika demonstrated that some basic assumptions made by the District Court were factually erroneous. Specifically, Shee Atika addressed the District Court's related assumptions (i) that a land exchange was feasible (ER 59-61) and (ii) that any funding appropriations needed for an exchange would involve only "minor legislative adjustment or approval" (ER 59). Specifically, Shee Atika cited to a recent consultant's study, financed in part by Sierra Club, which had made a definitive review of possible land exchanges.[13] Shee would have been compelled to rule that the objections to the EIS were without merit. The District Court's ruling on the EIS adequacy issue are completely at odds with the substantive provisions and goals of the federal statutes mandating the Shee Atika conveyance. For that reason alone, the District Court's ruling on this issue cannot be allowed to stand.

CONCLUSION

For the foregoing reasons, Shee Atika submits that this Court should reverse the District Court's ruling of inadequacy of the EIS, vacate its related order invalidating the Section 404 permit, and vacate the injunction issued by the District Court.

Respectfully submitted,

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[13] This study was completed after the EIS process.

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EXHIBIT E

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. ———

SHEE ATIKA, INC.,
Appellant,

v.

CITY OF ANGOON, *et al.*,
Appellees.

MOTION FOR SUMMARY REVERSAL OF
DISTRICT COURT ORDER AND INJUNCTION

Shee Atika, Inc., hereby moves the Court for summary reversal of that part of the District Court's memorandum and order of November 26, 1985, which held the permit issued by the Corps of Engineers to Shee Atika, Inc., to construct a log transfer facility in the navigable waters of the United States void on the ground that the environmental impact statement prepared by the Corps was inadequate and providing

> (6) THAT as of December 11, 1985, Shee Atika shall be enjoined from all use of the Cube Cove Log Transfer Facility until a valid § 404 permit has been obtained.

Notice of Appeal was filed on December 13, 1985.

This case was before the Court in *City of Angoon v. Marsh*, 749 F.2d 1413 (Opinion of December 27, 1984), wherein this Court reversed the District Court and vacated an injunction prohibiting Shee Atika from developing its lands. The Court was composed of Judges

Sneed, Wright and Alarcon. Shee Atika requests that its motion be referred to that panel of judges because of their familiarity with the case.

A memorandum in support of this motion is attached.

Respectfully submitted,

By /s/ Richard Anthony Baenen
RICHARD ANTHONY BAENEN

By /s/ Pierre J. LaForce
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By /s/ Jacquelyn R. Luke
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Attorneys for Appellant

December 16, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. ———

SHEE ATIKA, INC.,
Appellant,

v.

CITY OF ANGOON, *et al.*,
Appellees.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY REVERSAL

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MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY REVERSAL

REASONS SUPPORTING SUMMARY REVERSAL

1. The District Court's ruling ignores, and is contrary to the holding by this Court, vacating an earlier injunction issued by the District Court, that Congress, by section 506(c) of ANILCA, granted Shee Atika Settlement Act lands on Admiralty Island for economic development. *City of Angoon v. Marsh*, 749 F.2d 1413 (1984).

2. The District Court's ruling is manifestly erroneous, and reversal is plainly warranted.

3. The effect of the holding and injunction is so devastating to Shee Atika's precarious financial condition that unless this Court summarily reverses, Shee Atika may not survive as a viable entity.

STATEMENT OF THE CASE

This is an interlocutory appeal of an injunction entered by the United States District Court for the District of Alaska, effective December 11, 1985. (A copy of the Memorandum/Order entering same is attached as Appendix A.) Notice of Appeal was timely filed on Deecmber 13, 1985.

In their Consolidated Complaint herein, Sierra Club/Angoon alleged, *inter alia*, that the Environmental Impact Statement ("EIS") prepared by the Corps of Engineers with respect to issuance of a section 404 Clean Water Act permit to Shee Atika to construct a log transfer facility ("LTF") on Shee Atika's Admiralty Island lands was defective for failure to study as an alternative the possible exchange by Shee Atika of its lands on Admiralty for off-Island lands.[1]

---

[1] Sierra Club/Angoon did not challenge the EIS on any substantive grounds, only the alleged failure to study as an alternative the exchange of Shee Atika's lands.

Motions and cross-motions for summary judgment were filed by the parties on all the issues raised in the Complaint. On October 17, 1985, the District Court filed two memoranda and orders, one on the subsistence and trust responsibility issues, the other on the section 22(k) issue (Appendices B and C). On November 27, 1985, the District Court filed its memorandum and order on the remaining issues in the complaint, holding against Sierra Club/Angoon on all issues except that challenging the adequacy of the EIS and ordered

> (7) THAT as of December 11, 1985, Shee Atika shall be enjoined from all use of the Cube Cove Log Transfer facility until a valid § 404 permit has been obtained. [Appendix A, p. 21.]

On the afternoon of December 5, 1985, Shee Atika filed with the District Court a motion for reconsideration, which the District Court denied the next morning.

OVERVIEW

This is the second time within 17 months the District Court has enjoined Shee Atika from productively developing its Settlement Act lands and the District Court's latest injunction issued less than one year from the date ths Court vacated the * * *

* * * *

STATEMENT OF THE FACTS

A. *Preparation of the EIS*

Pursuant to stipulation entered into by the federal defendants and Sierra Club/Angoon, it was determined in March 1983 to prepare an EIS for Shee Atika's proposed LTF.[2] All told, the EIS process consumed some 19 months.[3] The final EIS documents, consisting of a basic

[2] Shee Atika was not a party to this determination.

[3] In fact, the decision of the Corps to permit Shee Atika to continue with the construction of its LTF did not come until almost two years after the decision to conduct an EIS was made.

statement of some 150 single-spaced pages and appendices of three times that size, reflect that level of effort. This is the *only* EIS ever undertaken with respect to construction/operation of an LTF. The Corps' environmental review was comprehensive[4] and addressed every conceivable facet of the LTF. The *only* dispute concerning the legal adequacy of the EIS is whether it sufficiently addressed the alternative of an off-Island exchange between Shee Atika and the Federal Government.

The Corps *did consider* the exchange alternative, but concluded, in accordance with the applicable regulation,[5] that in-depth evaluation was not required. The Corps' consideration of the exchange alternative was described in the EIS as follows:

A number of commenters have suggested that an exchange of Shee Atika lands on * * *

* * * *

Dispositive motions were filed in the District Court after remand, and all issues were fully submitted by late June 1985. On October 17, 1985, the District Court filed two memoranda and orders, denying all of Sierra Club/Angoon's issues addressed therein (Appendices B and C), and on November 27, 1985, it filed the memorandum and order that enjoins Shee Atika (Appendix A). In that memorandum and order the District Court rejected all of Sierra Club/Angoon's claims but one—that the EIS was inadequate because the Corps failed to consider as an alternative to permitting the long transfer facility the possible exchange by Shee Atika of its Admiralty Island lands—and again enjoined Shee Atika.

Shee Atika does not share in the economic benefit of the Settlement Act. It was, in effect, incorporated on credit in 1974 and, with minor exception, has existed on

---

[4] The Corps commented: "Biological studies in Cube Cove have been more complete than in any other LTF in Southeast Alaska." EIS Appendices at N-148.

[5] 33 C.F.R. Part 230, App. B, ¶ 11.b.(5)(b) (1985).

credit. Its efforts to harvest timber in 1984 and 1985 were thwarted by the District Court's first injunction and the pendency of the litigation, and its renewed efforts thwarted by the most recent injunction. Shee Atika must generate income now from the development of its lands if it is to survive. In October 1985, it offered a stumpage sale, with the bids to be opened on February 28, 1986. The terms of the sale required the successful bidder to pay 50% of the sales price at closing. It was anticipated the sale would generate a minimum of $1.5 million when the contract was awarded. The sale must now be cancelled, because no * * *

* * * *

CONCLUSION

For the foregoing reasons, Shee Atika submits that the Court should summarily reverse the District Court's ruling of inadequacy of the EIS, and vacate the injunction issued by the District Court forthwith.

By /s/ Richard Anthony Baenen
RICHARD ANTHONY BAENEN

By /s/ Pierre J. LaForce
PIERRE J. LAFORCE

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By /s/ Jacquelyn R. Luke
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Attorneys for Shee Atika, Inc.

PROOF OF SERVICE

I, MATTHEW A. SURPRISE, certify and declare under penalty of perjury that I: am a citizen of the United States; am over the age of 18 years; am employed by Furth, Fahrner, Bluemle & Mason, at the address indicated, whose members are members of the State Bar of California and at least one of whose members is a member of the Bar of each Federal District Court within California; am not a party to or interested in the cause entitled upon the document to which this Proof of Service is affixed; and that I served a true and correct copy of the following document(s) in the manner indicated below:

SIERRA CLUB/ANGOON'S PETITION FOR REHEARING

(XX) by today depositing, at San Francisco, California, the said document(s) in the United States mail in a sealed envelope, with first-class postage thereon fully prepaid, addressed to: (and/or)

( ) by today personally delivering the said document(s) to the person(s) indicated below in a manner provided by law, by leaving the said document(s) at the office(s) or usual place(s) of business, during usual business hours, of the said person(s) with a cleark or other person who was apparently in charge thereof and at least 18 years of age, whom I informed of the contents.

[SEE ATTACHMENT A]

Dated: November 19, 1986

/s/ Mathew A. Sawyer

ATTACHMENT A

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(5)

No. 86-1627

In the Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ANGOON, ET AL., PETITIONERS

v.

DONALD HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Corps of Engineers' grant of a permit under Section 404 of the Clean Water Act (33 U.S.C. 1344) for the construction of a breakwater in navigable waters is a disposition of a property interest of the United States that requires the preparation of a subsistence evaluation under Section 810 of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), Pub. L. No. 96-487, 94 Stat. 2427.

2. Whether Section 503(d) of ANILCA (94 Stat. 2400), which prohibits the sale or harvesting of timber within the Admiralty Island National Monument in Alaska, applies to the privately owned land of respondent Shee Atika, an Alaska Native Corporation.

3. Whether the court of appeals erred in directing the entry of summary judgment for respondents on petitioners' claim under the National Environmental Policy Act, based on a determination that there were no remaining issues of material fact.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rules:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 803 F.2d 1016. A prior opinion of the court of appeals is reported at 749 F.2d 1413 (1985). The opinions of the district court (Pet. App. D1-D16, E1-E16, F1-F5) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on October 31, 1986, and a timely petition for rehearing was denied on December 1, 1986 (Pet. App. C1). By orders dated February 18, March 17, and March 27, 1987, Justice O'Connor extended the time within which to file the petition for a writ of certiorari to and including April 10, 1987. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, to settle the aboriginal claims of Alaskan Natives. "ANCSA authorized the payment of almost $1 billion cash and the conveyance of approximately 40 million acres of land to Alaskan Natives as compensation for extinguishment of their claims and to assist them in achieving financial independence and self-sufficiency." *City of Angoon* v. *Marsh*, 749 F.2d 1413, 1414 (9th Cir. 1984) (*Angoon I*). Respondent Shee Atika, Inc., is an Alaska Native Corporation established to receive and administer the ANCSA benefits of the Natives of Sitka, Alaska. The only benefit Shee Atika received under ANCSA was the right to the surface estate in up to 23,040 acres of land. 43 U.S.C. 1613(h)(3). In 1975, Shee Atika selected land on the southwest portion of Admiralty Island, near the community of Angoon. The Sierra Club and Kootznoowoo, Inc., a Native Corporation representing the Natives of Angoon, immediately filed suit to challenge this selection (Pet. App. A4).

Congress sought to resolve this controversy by enacting Section 506(c) of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), Pub. L. No. 96-487, 94 Stat. 2409. Section 506(c) provided that the Secretary of the Interior, upon passage of ANILCA, "shall convey" to Shee Atika equivalent acreage on the northwest portion of Admiralty Island, adjacent to Cube Cove, in satisfaction of Shee Atika's rights under ANCSA. Shee Atika in turn was required to release its claim to the lands it had selected on the southwest portion of the Island. 94 Stat. 2411. The Cube Cove lands are farther from Angoon and less environmentally sensitive than Shee Atika's original selection (Pet. App. A4). In ANILCA, Congress also designated most of the rest of Admiralty Island as the Admiralty Island National Monument. See § 503(b), 94 Stat. 2399.

Despite Congress's directive, petitioners challenged the Secretary's conveyance of the land adjacent to Cube Cove (Pet. App. A5). The Sierra Club also filed a notice of *lis pendens* in the Alaska land records, which prevented Shee Atika from obtaining financing for its timber development plans at the new site (*ibid.*). Congress responded to this renewed challenged to Shee Atika's plans by enacting Section 315 of the Interior Appropriations Act for 1983, Pub. L. No. 97-394, 96 Stat. 1998, which confirmed "in all respects" the title conveyed by the Secretary pursuant to Section 506(c) of ANILCA. The Explanatory Statement prepared by the Senate Committee on Appropriations stated (128 Cong. Rec. S14303 (daily ed. Dec. 9, 1982)):

> By section 506(c) of [ANILCA], Congress directed title to certain lands be conveyed to Shee Atika, Inc. Congress intended to settle pending litigation concerning the validity of certain withdrawals pursuant to the Alaska Native Claims Settlement Act. It was noted that Shee Atika received no funds under the Settlement Act, because of the lawsuit [it] had not yet received its land entitlement[,] and without a legislative solution Shee Atika could go bankrupt (S. Rept. No. 96-413, pp. 214-215). * * *
>
> * * * The purpose of this provision is to make clear that the title conveyed pursuant to section 506(c) is valid, conveyed pursuant to the Settlement Act and that the land is to be developed by Shee Atika for its economic growth and stability.

2.a. Notwithstanding Congress's action, petitioners filed yet another challenge to Shee Atika's plans, alleging that the proposed development of its land violated, inter alia, Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C); the subsistence protection provisions of Section 810 of ANILCA, 94 Stat. 2427, 16 U.S.C. 3120; Sections 402 and 404 of the Clean Water Act, 33 U.S.C. 1342 and 1344; and

federal trust responsibilities to the Natives of Angoon. Petitioners' primary claim under NEPA was that an environmental impact statement (EIS) was required for the permit issued by the United States Army Corps of Engineers, pursuant to Section 404 of the Clean Water Act, 33 U.S.C. 1344, for a log-transfer facility on Cube Cove. This facility will be used by Shee Atika to place harvested timber into the waters of the Cove, where it then can be bundled into rafts and towed away. A permit is required because the log-transfer facility includes a breakwater that extends into navigable waters. Pet. App. A5.

b. The federal defendants agreed to suspend the Section 404 permit and prepare an EIS. Shee Atika proceeded to harvest timber by other means that did not require placing a structure in navigable waters. Angoon then obtained a preliminary injunction barring even that activity. The injunction was based on the theory that Section 503(d) of ANILCA, 94 Stat. 2400, which prohibits the Secretary of Agriculture from permitting the sale or harvesting of timber "[w]ithin the Monument[]," applies to private lands as well as public lands that fall within the outer boundaries of the Admiralty Island National Monument. The court of appeals reversed the preliminary injunction. *Angoon I, supra.* It reasoned that Section 503(b) of ANILCA specifies that the Admiralty Island National Monument shall consist of "approximately 921,000 acres of *public lands*" (94 Stat. 2399 (emphasis added)), and therefore does not include private lands (749 F.2d at 1416). In the court's view, the text and legislative history of other provisions of ANILCA likewise made it "clear that Congress intended that the private status of the lands conveyed to Shee Atika is to remain unaffected by their inclusion within the exterior boundaries of the conservation system unit on Admiralty Island" (*Angoon I*, 749 F.2d at

1418). The court also found it "inconceivable that Congress would have extinguished [Shee Atika's] aboriginal claims and insured their economic well being by forbidding the only real economic use of the lands so conveyed" (*ibid.*).

c. On remand, petitioners filed a consolidated complaint challenging the legality of the conveyance to Shee Atika, the permits for the log-transfer facility, and Shee Atika's timber operations. The federal defendants moved for summary judgment on all claims at issue here (E.R. 111-112[1]), and Shee Atika moved for dismissal or summary judgment on all claims (E.R. 113). Petitioners moved for summary judgment on the bulk of their claims (E.R. 108-109, 114-117). With respect to NEPA, petitioners maintained that the EIS did not adequately consider alternatives to the log-transfer facility (E.R. 115-117). Although petitioners alleged that they had other grounds for challenging the EIS that would require discovery (see page 15, *infra*), they did not identify those other grounds.

The district court granted partial summary judgment to petitioners on their claim that the Section 404 permit for the log-transfer facility was invalid under NEPA, on the ground that the EIS did not study the alternative of having Shee Atika exchange its Admiralty Island tract for land located elsewhere in Alaska (Pet. App. D8-D15). The court dismissed or granted summary judgment in favor of

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[1] "E.R." refers to the Excerpts of Record filed in the court of appeals. The federal defendants' summary judgment motion did not apply to claims relating to the issuance of a National Pollutant Discharge Elimination System (NPDES) permit for the log-transfer facility, pursuant to Section 402 of the Clean Water Act, 33 U.S.C. 1342. Those claims have been stayed pending resolution of an administrative appeal that is still pending before the Environmental Protection Agency. Pet. App. D7.

the defendants on all other claims. The court then entered a partial final judgment under Fed. R. Civ. P. 54(b). See Pet. App. F1-F5.

d. The court of appeals reversed the district court's order insofar as it declared the Section 404 permit void on NEPA grounds, observing that the Corps of Engineers had spent 19 months preparing an EIS that was "technically sophisticated and analytically rigorous" (Pet. App. A8-A9). In particular, the court of appeals sustained the Corps' reasons for not giving more extensive considerations to the alternative of a possible exchange of Shee Atika's current holding. The court explained (i) that the exchange alternative would not satisfy the specific purpose for which the Section 404 permit was sought, *viz.*, facilitating timber harvesting on Shee Atika's present land; (ii) that the exchange alternative was speculative because it was dependent upon action by Congress, which had only recently directed and then ratified the conveyance of that land to Shee Atika; and (iii) that the Corps was justifiably reluctant to deny a Section 404 permit merely to force Shee Atika to agree to exchange its present holding for land elsewhere (Pet. App. A9-A11). Finding no remaining issues of material fact regarding the validity of the EIS, the court of appeals directed summary judgment for the defendants on the question of the validity of the log-transfer facility permit under Section 404 (Pet. App. A12).

The court of appeals affirmed the district court's order in all other respects (Pet. App. A13-A25). First, the court reaffirmed its holding in *Angoon I* that Section 503(d) of ANILCA prohibits timber harvesting only on the public lands that constitute the National Monument, noting that "reading section 503(d) to prohibit logging on [Shee Atika's] Cube Cove inholding would forbid the land's only real economic use and defeat the purpose of section 506(c)'s conveyance of the land" (Pet. App. A15-A16). Second, the court rejected petitioners' claims under Section 810 of

ANILCA, 94 Stat. 2427, which requires a subsistence evaluation if a federal agency proposes to "withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands." The court held that Section 810 is inapplicable because Shee Atika's land is privately owned and because the United States has no ownership interest in the waters of Cube Cove, in which the breakwater for the log-transfer facility would be constructed (Pet. App. A22 n.6).[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. In fact, petitioners do not seek review on the principal issue they raised in the courts below—that the Corps of Engineers, in preparing the EIS, should have considered the alternative of exchanging Shee Atika's current tract for land elsewhere in Alaska. Furthermore, the decision below arises in unique circumstances that have been repeatedly addressed by Congress for the specific purpose of resolving objections to Shee Atika's acquisition and development of its land on Admiralty Island. Review by this Court therefore is not warranted.

1. Petitioners first contend (Pet. 7-15) that Section 810 of ANILCA applies to the Corps' grant of a permit under Section 404 of the Clean Water Act. Section 810 requires the federal agency having "primary jurisdiction" over public lands that are proposed for disposition to evaluate the subsistence effects of the disposition. However, Section 810 by its terms applies only to "public lands," which term

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[2] The court also rejected petitioners' claim, not renewed here, that Shee Atika's timber harvesting is barred by time limitations in Section 22(k) of ANCSA, 43 U.S.C. 1621(k) (Pet. App. A17-A21). Petitioners' petition for rehearing was denied on December 1, 1986, in an order directing the mandate to issue forthwith (Pet. App. C1).

is defined in Section 102 of ANILCA to mean "land[s] situated in Alaska which * * * are Federal lands" (94 Stat. 2375, 16 U.S.C. 3102). "Federal land" is defined to mean "lands the title to which is in the United States," and the term "lands" includes "lands, waters, and interest therein." 94 Stat. 2375, 16 U.S.C. 3102(2) and (1). See *Amoco Production Co.* v. *Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 14. Petitioners' theory is that the navigational servitude in the waters of Cube Cove is in the nature of a proprietary "interest" in water, the title to which is in the United States, thereby rendering the servitude itself "public lands" for purposes of ANILCA. See Pet. 15. The court of appeals correctly rejected this novel proposition (Pet. App. A22 n.6).

In *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224 (1956), this Court explained:

> The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property.

See also *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 627-628 (1961), quoting *United States* v. *Commodore Park*, 324 U.S. 386, 390 (1945) (the navigational servitude arises from the "power of the government to control and regulate navigable waters in the interest of commerce"). The United States of course may choose to waive its power to regulate navigable waters or may permit certain obstructions to navigation. *Twin City Power*, 350 U.S. at 228. But the United States clearly does not grant title to an interest in property when it permits a party to place a breakwater in navigable waters. "[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable." *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913); see also *Twin City Power*, 350 U.S. at 228; *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179 (1979).

Contrary to petitioners' contention (Pet. 12-15), the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, confirms that the navigational servitude is not a species of property.[3] Section 3(a) of the Submerged Lands Act, 43 U.S.C. 1311(a), vested in the States the "title to and ownership of the lands beneath navigable waters within [their] boundaries * * * and the natural resources within such lands and waters * * * ." Section 5(a), 43 U.S.C. 1313(a), excepted from this grant any lands and resources the "title to which has been lawfully and expressly acquired by the United States" or in which the United States otherwise retained a property interest. See *United States* v. *California,* 436 U.S. 32, 38 (1978). Significantly, however, the navigational servitude was protected not by Section 5(a), but by Section 6(a) of the Submerged Lands Act, 43 U.S.C. 1314(a), which reserved to the United States the "navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." Section 6(a) expressly provided that this reservation shall *not* be deemed to include "proprietary rights of ownership * * *." Thus, Congress distinguished between the Federal Government's retention of property interests and its retention of regulatory powers, and Congress placed the navigational servitude in the latter category. See *United States* v. *California,* 436 U.S. at 41 & n.18. This pre-existing statutory distinction reinforces the conclusion that the navigational servitude likewise was not intended by Congress to be among the interests in property covered by Section 810 of ANILCA.

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[3] As the Court noted in *Gambell,* slip op. 14, the Submerged Lands Act applies to Alaska by virtue of Section 6(m) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 343.

The decision in *Gambell* also supports this conclusion. The Court there held that the grant of oil and gas leases on the Outer Continental Shelf (OCS) is not subject to Section 810 of ANILCA because the OCS is not "in Alaska," as required by Section 102(3), 94 Stat. 2375, 16 U.S.C. 3102(3). Significantly, however, the Court also explained that Congress could not have intended Section 810 to apply to the OCS for an additional reason (slip op. 19):

> Section 810 places the duty to perform a subsistence evaluation on "the head of the Federal agency having primary jurisdiction over such lands." Unlike onshore lands, no federal agency has "primary jurisdiction" over the OCS; agency jurisdiction turns on the particular activity at issue. See G. Coggins & C. Wilkinson, Federal Public Land and Resources Law 434 (1981).

As with the OCS, federal responsibility over waters in the three-mile coastal zone is divided among various agencies: navigation in coastal waters is subject to Coast Guard regulation; fishery resources are regulated by the National Marine Fisheries Service of the Department of Commerce (and in some instances by the Fish and Wildlife Service of the Department of the Interior); discharges of pollutants are regulated by the Environmental Protection Agency; and obstructions to navigable capacity must be approved by the Corps of Engineers. None of these agencies has "primary jurisdiction" over the coastal waters of Alaska.

Petitioners rely (Pet. 12) on the statement in *Gambell* that "[t]he United States may not hold 'title' to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have 'title' to any 'interests therein' " (slip op. 16 n.15). That passage, however, referred not to the navigational servitude, but to mineral interests leased by the Untied States. The United States does not have any mineral interests in the three-mile coastal zone granted to the State by the Submerged Lands Act,

and no such interests would be implicated in any event by the construction of the log-transfer facility for which Shee Atika sought a permit under Section 404.

Nor does *United States* v. *Cherokee Nation,* No. 85-1940 (Mar. 31, 1987), suggest that the navigational servitude is a property interest for purposes of Section 810 of ANILCA. As petitioners concede (Pet. 15), the Court in *Cherokee Nation* found the source of the navigational servitude to be the Commerce Clause (see slip op. 4), not the Property Clause. Petitioners therefore err in reading (Pet. 17) *Cherokee Nation* to hold that the navigational servitude is a property interest that could be conveyed to a private party. Instead, the Court simply suggested that the Cherokee Nation could have been (but was not) granted "an exemption from the servitude," through a "waiver of sovereign authority" (slip op. 7). This language is fully consistent with the character of the navigational servitude as a regulatory power.

2. The court of appeals correctly rejected petitioners' contention (Pet. 17-19) that Shee Atika's private land on Admiralty Island is governed by Section 503(d) of ANILCA, which provides that "[w]ithin the Monuments, the Secretary [of Agriculture] shall not permit the sale o[r] harvesting of timber" (94 Stat. 2400). As the court of appeals observed in *Angoon I* (749 F.2d at 1416), Section 503(b) defines the Admiralty Island National Monument as consisting of "approximately 921,000 acres of *public lands*" (emphasis added). Shee Atika's lands are private, not public, and they therefore are not part of the National Monument and are not subject to the prohibition against timber harvesting "within the Monument[]." This interpretation is supported by Section 103(c) of ANILCA, 94 Stat. 2377, 16 U.S.C. 3103(c), which states that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of

such unit." Furthermore, the legislative history makes clear that "inclusion of these Native lands within the boundaries of conservation system units is not intended to * * * restrict use of such lands by the owning Corporations nor to subject the Native lands to regulations applicable to the public lands within the specific conservation system unit" (125 Cong. Rec. 9905 (1979) (remarks of Rep. Udall) (quoted in *Angoon I,* 749 F.2d at 1417)). Indeed, as the court of appeals observed (Pet. App. A15-A16; *Angoon I,* 749 F.2d at 1418), application of the timber-harvesting prohibition to Shee Atika's land would deprive that land of its only real economic use, and would thereby frustrate Congress's purpose of promoting "economic growth" when it provided for and then ratified the exchange of Shee Atika's original ANSCA selection for the tract at issue here. See page 3, *supra.*[4]

Gambell does not support petitioners' contention that both public and private lands are subject to the timber-harvesting prohibition in Section 503(d). In *Gambell,* the Court concluded that the term "in Alaska," as used in Section 102(3) of ANILCA, does not include the OCS, which by definition is outside Alaska. Slip op. 14. But the Court did not suggest that Congress's use of the phrase "in Alaska" was intended to subject *all* lands within the boundaries of the State, private as well as public, to the subsistence-evaluation provisions of Section 810 of ANILCA. To the contrary, the Court recognized (slip op.

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[4] Section 503(d) states that "the Secretary shall not permit" the sale or harvesting of timber. This language does not impose a prohibition directly on private parties with respect to their private affairs, but rather imposes a duty on the Secretary with respect to matters under his jurisdiction. As the court below recognized in *Angoon I* (749 F.2d at 1416), the Secretary of Agriculture does not have jurisdiction to manage private lands in general (see 16 U.S.C. 1609(a)) or the private lands conveyed to a Native Corporation in particular (see 43 U.S.C. 1621(i)).

13-14) that Section 810 applies only to "public lands" (94 Stat. 2399). Similarly, Section 503(a) of ANILCA defines the Admiralty Island National Monument as consisting only of "public lands." The parallel reach of Section 810, as construed in *Gambell,* therefore supports, rather than undermines, the court of appeals' interpretation of Section 503(d).[5]

3. Petitioners' remaining contention (Pet. 19-25)—that the court of appeals erred in directing entry of summary judgment for the respondents on the issue of the adequacy of the EIS (Pet. App. A3)—likewise does not warrant review. Although the district court found the EIS inadequate (and granted summary judgment for petitioners) on the ground that the Corps had failed to consider the alternative of exchanging Shee Atika's current holding for other land, the court of appeals reversed and held that the Corps was not required to consider that alternative further. Petitioners expressly do not seek review on that issue. See Pet. 7 n.4. Instead, petitioners object to the court of appeals' ruling insofar as it disposes of other possible objections they might have had to the EIS. That ruling, however, was entirely appropriate.

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[5] The decision below also does not conflict with *Minnesota* v. *Block,* 660 F.2d 1240, 1248 n.15 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982), cited by petitioners (Pet. 18-19). That case construed Section 4 of the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1650, which prohibits motorboats "within the wilderness" created by the Act. The Eighth Circuit observed that this prohibition must apply to waters under state jurisdiction in order for the prohibition to have any meaning, "[i]nasmuch as all navigable waters within the area fall under state jurisdiction." 660 F.2d at 1248 n.15. The court also found that certain exemptions contained in Section 4 of the Boundary Waters Act would make no sense unless all waters within the area were covered by the prohibition (ibid.). These considerations are not presented by Section 503(d) of ANILCA. To the contrary, as noted above (see pages 11-12, *supra*), the language and legislative history of ANILCA affirmatively demonstrate that Shee Atika's private holding was not intended to be subject to restrictions applicable to the Admiralty Island National Monument.

a. The court of appeals was presented with a controversy that had been the subject of litigation for 12 years. That litigation had deprived Shee Atika of the compensation Congress afforded it under ANSCA for the extinguishment of its aboriginal claims (Pet. App. A4), despite Congress's actions in 1980 and 1983 to ensure that Shee Atika would realize the economic benefits of the very tract at issue in this case. The court of appeals had authority under 28 U.S.C. 2106 to direct the entry of a judgment "as may be just under the circumstances." In the circumstances of this case, it clearly was "just" to resolve the EIS adequacy issue in its entirety, rather than to remand to the district court based on speculation that petitioners might come up with new theories to attack the EIS, and thereby further frustrate Shee Atika's ability to make economic use of its lands.

The 120-page EIS and all relevant parts of the administrative record were before the court of appeals, which reviewed the EIS and found it "technically sophisticated and analytically rigorous" (Pet. App. A8-A9).[6] Furthermore, petitioners had ample opportunity to develop other challenges to the EIS, yet failed to do so. A draft EIS concerning the log-transfer facility had been distributed for public comment in March 1984, and after public hearings, the final EIS was issued in October 1984 (E.R. 139, 293). Comments on the final EIS were accepted until December 17, 1984 (E.R. 139). Petitioners filed their consolidated complaint on April 29, 1985, more than four months later (Pet. App. A6). That complaint alleged that

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[6] It has long been accepted practice to resolve EIS inadequacy claims on summary judgment motions that attach the administrative record. See, *e.g.*, *National Center for Preservation Law* v. *Landrieu*, 496 F. Supp. 716, 737-738 (D.S.C.), aff'd, 635 F.2d 324 (4th Cir. 1980); *Upper Westfork River Watershed Ass'n* v. *Corps of Engineers*, 414 F. Supp. 908, 922 (N.D. W.Va. 1976), aff'd, 556 F.2d 576 (4th Cir. 1977), cert. denied, 434 U.S. 1010 (1978).

the Corps of Engineers issued an EIS on the log-transfer facility "without studying the reasonable alternative of an exchange of the Cube Cove lands for other timber lands located off of Admiralty Island, and otherwise without complying to the fullest extent possible with NEPA" (E.R. 14). But petitioners never specified in what respects the EIS was "otherwise" defective under NEPA.

Both the federal defendants and Shee Atika moved for summary judgment on petitioners' entire NEPA claim. See page 5, *supra*. Petitioners filed a cross-motion for summary judgment on the NEPA claim insofar as it was based on the exchange alternative, and they opposed respondents' motion for summary judgment on other aspects of the NEPA claim. But in so doing, petitioners did not file affidavits pursuant to Fed. R. Civ. P. 56(e) to demonstrate the existence of a genuine issue of material fact regarding other possible defects in the EIS. The court of appeals therefore did not have before it a record that either identified other specific defects in the EIS or demonstrated the existence of a genuine issue of material fact pertaining to any such defect.

Counsel did file an affidavit in district court, pursuant to Rule 56(f), stating that petitioners could not at that time present facts essential to justify their opposition to petitioner's motion. Affidavit of Lewis F. Gordon, dated 6/18/85. Even then, however, counsel did not identify any specific ground (other than the alleged failure to consider the exchange alternative) on which their opposition to the defendants' motions for summary judgment might be based. Counsel merely suggested in general terms that there were disputed facts concerning the "environmental and subsistence effect of the project" (*id.* at 3) and indicated that petitioners would seek discovery of such facts. Petitioners' submission under Rule 56(f) was addressed to the discretion of the court. See 6 J. Moore & J. Wicker, *Moore's Federal Practice* § 56.24, at 56-1424 to 56-1425,

56-1437 to 56-1438 (2d ed. 1987); *VISA Int'l Service* v. *Bankcard Holders,* 784 F.2d 1472, 1475 (9th Cir. 1986); *SEC* v. *Spence & Green,* 612 F.2d 896, 901 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981). For at least three reasons, the court of appeals did not abuse its discretion by declining to accept counsel's affidavit under Rule 56(f) as a basis for still further proceedings and attendant delay. First, when counsel executed the affidavit on June 18, 1985, petitioners already had had at least seven months since the filing of the final EIS (and 14 months since the filing of the draft EIS) during which they could have developed facts concerning other possible defects in the EIS, through discovery or otherwise. Indeed, if petitioners disagreed with the "methodology and data" in the EIS, as they now vaguely claim (Pet. 21 n.20), they should have raised that issue with the Corps of Engineers during the comment period on the draft EIS. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553-554 (1978). Second, petitioners have not initiated discovery with respect to any other objections to the EIS since June 1985. Third, petitioners have not in any event identified a specific legal question regarding the adequacy of the EIS to which any facts that might be developed through discovery would be material.

Against this background, it appears that the discovery petitioners contemplate would be nothing more than a fishing expedition, based on speculation that a basis for some other objection to the EIS (and to the defendants' motions for summary judgment) might surface. See *First Nat'l Bank* v. *Cities Service Co.,* 391 U.S. 253, 298 (1968); *Bettin* v. *Nelson,* 744 F.2d 53, 58 (8th Cir. 1984); *Taylor* v. *Gallagher,* 737 F.2d 134, 137 (1st Cir. 1984); *Mid-South Grizzlies* v. *Nat'l Football League,* 720 F.2d 772, 779-781 (3d Cir. 1983), cert. denied, 467 U.S. 1215 (1984); *Exxon Corp.* v. *FTC,* 663 F.2d 120, 127-128 (D.C. Cir. 1980); *Contemporary Mission, Inc.* v. *USPS,* 648 F.2d 97,

106-107 (2d Cir. 1981). Petitioners might have preferred to hold in reserve the possibility of mounting a different attack on the EIS should their argument concerning the exchange alternative fail, so that they might further delay the resolution of this case and the economic development of Shee Atika's land. But the court of appeals surely was not required to countenance such a piecemeal attack on the EIS.

b. Contrary to petitioners' contention (Pet. 23-24), this case is readily distinguishable from *Fountain* v. *Filson,* 336 U.S. 681 (1949). There, the court of appeals directed the entry of summary judgment "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court" (*id.* at 683). Here, by contrast, the adequacy of the EIS as a whole was put in issue by the respondents' motions for summary judgment. Petitioners could have defended against those motions by developing their unspecified NEPA claims.

The decision below also is consistent with other cases in which courts of appeals have found it appropriate to direct the entry of summary judgment where the record disclosed no genuine issue of material fact. See *Viger* v. *Commercial Insurance Co.*, 707 F.2d 769, 774 (3d Cir. 1983); *Morgan Guaranty Trust Co.* v. *Martin,* 466 F.2d 593, 599-600 (7th Cir. 1972); *Stein* v. *Oshinsky,* 348 F.2d 999, 1002 (2d Cir. 1965); see also 6 *Moore's Federal Practice, supra,* § 56.27[1], at 56-1560; 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure, Civil 2d* § 2716, at 660-662 (2d ed. 1983). Indeed, in *Kern County Land Co.* v. *Occidental Corp.,* 411 U.S. 582, 590-591 (1973), this Court sanctioned the court of appeals' direction of summary judgment for the appellant, despite the appellant's failure even to move for summary judgment in the district court. 411 U.S. at 604 n.31; *id.* at 614 (Douglas, J., dissenting). Petitioners conceded below that a court of appeals

has the power under 28 U.S.C. 2106 to direct the entry of summary judgment in appropriate circumstances. See Reh'g Pet. 6. They therefore merely argue that the court of appeals should not have done so in the particular circumstances of this case. Moreover, as petitioners concede (Pet. 22 n.21), the paragraph in the court of appeals' opinion directing that summary judgment be entered for respondents on the NEPA claim is not accompanied by any discussion of the various issues petitioners discuss, and it therefore is of little or no precedential value with respect to them. Review by this Court therefore is particularly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

No. 86-1627

OCTOBER TERM, 1986

CITY OF ANGOON, ET. AL., PETITIONERS

v.

DONALD HODEL, SECRETARY OF THE INTERIOR, ET AL., SHEE ATIKA, INC., and SEALASKA, CORP., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the United States has relinquished title to the navigational servitude within the three-mile limit of Alaska's coastal waters, so that it need not comply with the procedural protection provided subsistence resources in § 810(a) of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 1320(a).

2. Whether the Ninth Circuit's holding that the prohibition against harvesting timber "within the Monument" in ANILCA § 503(d) does not apply to a private inholding located "within the *boundaries* of the Admiralty Island National Monument" conflicts with this Court's construction of the analogous geographic term "in Alaska" in ANILCA § 102 in *Amoco Production Co. v. Gambell*, 107 S. Ct. 1396 (1987).

3. Whether the Ninth Circuit erred in entering summary judgment *sua sponte* against Petitioners, without providing them an opportunity in either the district court or the court of appeals to conduct discovery or demonstrate that there were disputed issues of material fact, contrary to this Court's holding in *Fountain v. Filson*, 336 U.S. 681 (1949).

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Cases—Continued: Page

Statutes

Statutes—Continued: Page

Miscellaneous

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REPLY BRIEF OF PETITIONERS

I. Whether the Navigational Servitude Is a Property Interest Warrants Review

A. Whether the navigational servitude is a property "interest" in coastal waters entitled to the subsistence protection of ANILCA § 810, or merely a regulatory power, warrants review. The question is important not only for purposes of ANILCA § 810, but also for the many "takings" cases upholding the servitude's no-compensation rule.[1]

B. The navigational servitude is an interest in Alaska's coastal waters; Federal Respondents' discussion of the origin of the servitude does not change this. They note that for inland waters (not at issue here), the servitude "originates in

[1] *See, e.g., United States v. Cherokee Nation of Okla.*, 107 S. Ct. 1487 (1987); cases cited in Pet. at 17 n.16. *Cf. Utah Div. of State Lands v. United States*, 55 U.S.L.W. 4750 (U.S. June 8, 1987) (majority relies on *Arizona v. California*, 373 U.S. 546, 597–98 (1963), to suggest that the federal government's interest in navigable waters would shield it against compensation despite Utah's ownership of the submerged lands, while dissent asserts that *Arizona* does not provide a sufficient shield outside the limits of the navigational servitude).

the Commerce Clause [which] . . . speaks in terms of power, not property." Federal Resp. at 8, *quoting United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1956). But they completely ignore that the property interest in the navigational servitude is "so subordinated" to sovereign power "as in substance to coalesce and unite in the national sovereign." *United States v. Texas*, 339 U.S. 707, 719 (1950). This property interest in the servitude is consistent with its regulatory aspects, and serves to complement, rather than contradict, the conception of the servitude as an element of sovereign power.

In the Tidelands cases, the Court reasoned that the United States acquired complete dominion over all property interests in the three-mile coastal zone when it extended sovereignty. *E.g., United States v. California*, 332 U.S. 19, 34 (1947) ("Not only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty.") The Court also reasoned that even though the State of Texas originally held both *dominium* and *imperium* over its coastal zone, the waiver of *imperium* upon admission to the Union relinquished *dominium* as well. *United States v. Texas*, 339 U.S. at 718-19 ("property interests are so subordinated to the rights of sovereignty as to follow sovereignty"). The coastal interests acquired through sovereignty are treated like any other property. *Alabama v. Texas*, 347 U.S. 272, 275 (1954) (Submerged Lands Act valid under the Property Clause).

Under the Submerged Lands Act, 43 U.S.C. §§ 1301-1356 (1982), the United States granted the States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters," *id.* at § 1311(a), while specifically retaining the navigational servitude. *Id.* at § 1314(a).

Federal Respondents misconstrue this retention. Federal Resp. at 9. *See also* Shee Atika at 7-8. Section 1314(a) states only that the reservation "shall not be deemed to include proprietary rights of ownership . . . *of the land and natural resources which are specifically . . . assigned* to the respective States and others *by section 1311* of this title." 43 U.S.C. § 1314(a) (emphasis added). But the navigational servitude was not one of the interests "specifically . . . assigned to the respective States." Nor has it passed to private ownership. Title to the servitude remains in federal ownership.

The reasoning of *Texas* and *Alabama* and the other Tidelands cases—that the navigational servitude is a property interest as well as a regulatory power—is consistent with the Court's long line of decisions denying compensation for the use of the navigational servitude. *See, e.g.*, cases cited in Pet. at 17 n.16. Indeed, the property aspect of the servitude offers a parsimonious explanation for the no-compensation rule: the United States need not pay for what it already owns. *See Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) (Holmes, J.) ("the Constitution . . . does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole"), *cited in United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913) (denying compensation for property interest encumbered by navigational servitude).[2] Because this exception is otherwise an "unexplained anomaly," Clark, 2 *Waters and Water Law* § 101.3(A) at 17 (1967), recognition of the servitude as a property interest, as well as a power of regulation, provides firmer protection against future "takings" claims. *Cf. First English Evangelical Lutheran Church*

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[2] *See also* Bartke, *The Navigational Servitude and Just Compensation—Struggle for a Doctrine*, 48 Or. L. Rev. 1, 38 (1968); Powell, *Just Compensation and the Navigation Power*, 31 Wash. L. Rev. 271, 271 (1956).

v. Los Angeles County, 55 U.S.L.W. 4781 (U.S. June 9, 1987) (granting compensation for "temporary" taking).

C. Federal Respondents' observation that "[t]he United States clearly does not grant title to an interest in property when it permits a party to place a breakwater in navigable waters" is irrelevant to the recognition that the servitude is an interest in Alaska's coastal waters. Federal Resp. at 8. Section 810 applies to decisions to "permit the use [or] occupancy" of public lands or interests therein, as well as decisions to dispose of such lands or interests. Federal decisions to "permit the use [or] occupancy" of public lands or interests therein clearly do not contemplate the grant of title, and the granting of title is not required for § 810 to apply.

Nor are Federal Respondents correct in suggesting that no agency has primary jurisdiction over the navigational servitude. On the contrary, the Corps of Engineers has primary jurisdiction. Pet. at 11. This is not changed by the fact that other federal agencies also have jurisdiction. This is no different than when the federal government owns on-shore lands in fee simple; even for fee lands such as national forests, federal responsibility is divided among various agencies, including the Fish and Wildlife Service and the Environmental Protection Agency.

D. Unless the navigational servitude is recognized as an interest in property, the critical resources of Alaska's coastal waters will not be protected under § 810 of ANILCA. As Congress was well aware, almost all of the Native villages with subsistence cultures are located along the Alaskan coast or upon the shore of one of the State's lakes or rivers. *See* 126 Cong. Rec. H10545 (November 12, 1980) (statement of Rep. Udall). Protection of subsistence uses of coastal resources was one of the most important concerns addressed in ANILCA. *Cf.* H.R. Rep. No. 1045, 95th Cong., 2d Sess. 181 (1978). Congress simply could not have intended to exclude coastal waters from protection under § 810.

II. Construction of the Statutory Protection for Admiralty Island Monument Warrants Review

A. As shown by the many acts of Congress that have addressed it, and the 1978 Presidential Proclamation first providing protection, the Admiralty Island National Monument is an important national resource. The proper construction of its statutory protection warrants review.

B. As in *Gambell*, the geographic expression "within the Monument" should be given its plain meaning. *See Amoco Prod. Co. v. Village of Gambell*, 107 S. Ct. 1396, 1408 (1987). The "recognition that Congressmen typically vote on the language of a bill," *id.* at 1406, is especially important in construing ANILCA, which "is comprised of 15 titles and spans 181 pages of the Statutes at Large," *id.* at n.16, and which has an unwieldy legislative history.[3] This is not "that 'exceptional case' where acceptance of the plain meaning . . . would 'thwart the obvious purpose of [ANILCA].'" *Id.* at 1406. To the contrary, construing "within the Monument" to include private inholdings is the *only* way to give the term meaning, for other provisions of ANILCA already prohibit harvesting on the *public* lands within the Monument. ANILCA § 503(f)(1) ("the lands within the Monuments are hereby withdrawn from all forms of . . . disposal . . .") (Pet. App. G2). *See also* § 503(c) (Monument "shall be managed . . . to protect" its resources) (Pet. App. G2).

C. The assertion that giving "within the Monument" its plain meaning would deprive the private inholding of its only economic use is incorrect and unwarranted. Federal Resp. at

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[3] "The tortuous path which ANILCA followed through Congress makes it difficult to discern one true compelling legislative intent" for each provision of the Act. Kueffner, Southeast Alaska Conservation Council Inc. v. Watson *and the Future of ANILCA*, 12 Ecology L. Q. 149, 163 (1984).

12; Shee Atika at 9. As in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136 (1978), where a zoning restriction was saved in part because the air rights allegedly "taken" could be transferred, the opportunity to exchange the inholding here for lands of equal or greater value outside the Monument removes any asserted inconsistency between § 503(d)'s timber prohibition and the conveyance of the inholding in § 506(c).[4] Not only is exchange specifically available under ANILCA,[5] but the very inholding at issue was previously exchanged by another Native corporation for lands of equal or greater value outside the Monument.[6] Congress was fully aware that the Cube Cove inholding could be exchanged once again for equal or greater value. *See also* § 506(d) (providing continuing authorization to reimburse Native corporations for costs of negotiating land exchange within the Admiralty Monument), 94 Stat. at 2412.

D. Quite apart from ANILCA's exchange provisions or the history of the earlier Cube Cove exchange, the Ninth Circuit's conclusion that the timber prohibition would deprive the inholding of *all value* ("its only real economic use") was only an assumption. Pet. App. A16. Facts, however, govern

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[4] *See also Andrus v. Allard*, 444 U.S. 51 (1979) (recognizing the substantial value implicit in the possibility of exchange, and applying this value to defeat allegations of a regulatory taking).

[5] Exchanges of Native corporation inholdings are authorized by ANILCA § 1302, 16 U.S.C. § 3192 (1982), and ANCSA § 22, 43 U.S.C. § 1621 (1982).

[6] The earlier exchange of the Cube Cove inholding was confirmed by Congress in ANILCA § 506(b), 94 Stat. at 2409. The exchange agreement stated that the Cube Cove inholding "possesses outstanding natural values and ecological significance which should be preserved for public purposes. . . ." *Angoon I*, Plaintiffs' Excerpts of Record, Vol. 1, Tab 25 at 2.

whether a regulation diminishes value sufficiently to require compensation as a "taking,"[7] and facts, not assumptions, must govern whether the prohibition deprives the Cube Cove inholding of all value. There is no support whatsoever for the Ninth Circuit's assumption, and it must be rejected.

E. Also without merit is Federal Respondents' suggestion that § 315 of the Interior Appropriations Act of 1983 mooted Petitioners' challenge under § 503(d). Federal Resp. at 3. Federal Respondents fail to cite the proviso ("nothing herein shall be deemed to amend" ANILCA or ANCSA) (Pet. App. D5). They also fail to mention that the district court rejected this construction of § 315 ("The court does not believe § 315 was intended to moot challenges to the conveyance arising out of ANILCA or ANCSA") (Pet. App. D6) when it addressed Petitioners' claim on the merits, as did the Ninth Circuit. Pet. App. A13-17.

III. The Ninth Circuit's Decision Conflicts With *Fountain v. Filson* and Otherwise Warrants Review

A. The Ninth Circuit's grant of summary judgment on factual claims that were never addressed in the district court conflicts with the holding in *Fountain v. Filson*, 336 U.S. 681 (1949), and chills the use of partial summary judgment.[8] Respondents' attempts to distinguish *Fountain* are unavailing. Federal Resp. at 17; Sealaska at 4–5. Here, the overall factual adequacy of the EIS was not "put in issue by the

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[7] *See, e.g., Keystone Bituminous Coal Ass'n v. De Benedictis*, 107 S. Ct. 34 (1987), *quoting Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

[8] The Ninth Circuit's decision also conflicts with other decisions of the Court. *See* cases cited in Pet. at 21 n.19. *See also O'Connor v. Ortega*, 107 S. Ct. 1492 (1987).

respondents' motions for summary judgment." Federal Resp. at 17. Angoon filed a Rule 56(f) affidavit, noting among other things that "affidavits previously submitted in this lawsuit by experts and subsistence users . . . show that there are contested issues of fact." Shee Atika App. at 28a. Because Angoon's motion for *partial* summary judgment was granted and the EIS was declared inadequate as a matter of law, the district court was never required to rule on the sufficiency of the 56(f) affidavit, nor address factual inadequacies of the EIS. Absent such a ruling by the district court, the Ninth Circuit's grant of summary judgment on factual issues not heard by the district court conflicts with *Fountain v. Filson*.

B. Respondents' attempts to penalize Angoon for not conducting discovery are misleading. The Record of Decision on the FEIS was not issued until February 25, 1985. On March 4, 1985 the district court granted Angoon's motion to consolidate the litigation, Shee Atika App. at 17a; and on April 3, 1985 Angoon filed its consolidated complaint, raising, for the first time, the claim that the FEIS and the Corps of Engineers' permits issued, or about to be issued, for the breakwater and log transfer facility violated NEPA.[9] On May 3, 1985 Respondents moved for summary judgment—two months after the agency action being challenged became final, thirty days after Petitioners' new claim was filed, and only ten days after the minimum twenty day waiting period

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[9] The "EIS is not a decision document and the filing of a final EIS is not to be considered a decision on a permit application. * * * Permit issuance cannot occur until 30 days after the final EIS has been noticed in the *Federal Register* by EPA and the Record of Decision signed." 33 C.F.R. § 230 app. B at 445 (1985). Until the agency action is final, judicial review is not appropriate. *Kleppe v. United States*, 427 U.S. 390, 406 n.15 (1976).

provided in Rule 56(a). As Respondent Sealaska notes, the various motions resulted in thirty-five briefs on the merits in the period that followed, Sealaska at 2 n.4, and "the district court proceedings were a procedural morass." *Id.* at 7. Discovery was neither required nor possible; the Rule 56(f) affidavit was sufficient.

C. Contrary to the argument of Federal Respondents, Federal Resp. at 14 n.6, full review of an EIS is not well suited for summary judgment.[10] Even in EIS cases where there are no disputes of fact and summary judgment is proper, the decision is appropriately made in the first instance by the trial court, not the court of appeals. In this case, there is no indication that the Ninth Circuit read the twenty-four affidavits submitted on subsistence issues alone (*see Angoon II*, Plaintiff's Excerpts of Record, Vol. I, Tabs 1-24) to determine whether they raised disputed issues of fact sufficient to uphold Angoon's Rule 56(f) affidavit.

D. Respondents' contentions that the Ninth Circuit's failure to discuss the summary judgment issue lessens the need to review the holding are unpersuasive. Federal Resp. at 18; Sealaska at 6. The opacity of the Ninth Circuit's decision does not lessen the importance of the issue for review. *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525, 531-32 (1958), *reh'g denied* 357 U.S. 933 (1958). It provides another reason for the Court to exercise its supervisory authority and correct the Ninth Circuit's decision.

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[10] *See* cases cited in Pet. at 21 n.20. *See also Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 787-88 (D.C. Cir. 1971) (reversing summary judgment that had declared EIS adequate) ("Rule 56 clearly contemplates that the parties shall have the opportunity for deposition in order to establish the existence of a material issue. * * * The grant of summary judgment [declaring the EIS adequate] prematurely terminated the discovery process and foreclosed plaintiffs' opportunity to substantiate their allegations.")

CONCLUSION

Petitioners respectfully request that their petition for writ of certiorari be granted.

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JUNE 26, 1987

No. 86-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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Petitioners,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
SHEE ATIKA, INC., AND SEALASKA CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF OF AN AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI AND BRIEF AMICUS CURIAE OF NUNAM KITLUTSISTI IN SUPPORT OF PETITIONERS

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20 pp

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SHEE ATIKA, INC., AND SEALASKA CORPORATION,

Respondents.

MOTION FOR LEAVE TO FILE A BRIEF OF AN AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to Supreme Court Rule 36.1, Nunam Kitlutsisti moves for leave to file a brief of an *amicus curiae*. The brief supports the petition for certiorari on one issue which Nunam Kitlutsisti litigated before this Court in *Amoco Production Co. v. Village of Gambell*, ___ U.S. ___ , 107 S. Ct. 1396 (1987). Counsel for respondent Sealaska Corporation, the Solicitor General, and counsel for petitioner City of Angoon consent to the filing of the brief. Counsel for respondent Shee Atika Corporation has not consented.

Respectfully submitted this 12th day of June, 1987.

/s/ ROBERT K. HICKERSON

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ISSUE PRESENTED

I. IS THE NAVIGATIONAL SERVITUDE IN COASTAL WATERS AN INTEREST IN WATER TO WHICH THE UNITED STATES HOLDS TITLE?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

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Respondents.

BRIEF AMICUS CURIAE OF NUNAM KITLUTSISTI IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

Amicus curiae Nunam Kitlutsisti is an intertribal organization representing fifty-six tribal villages in the Yukon-Kuskokwim Delta, an area comprising most of western Alaska. With a name literally translated from Yupik Eskimo as the "defender of life and land," Nunam Kitlutsisti has the mission of protecting the hunting and fishing rights of its members. This case presents an issue potentially affecting the scope of the statutory protections for Native fishing and hunting rights of Eskimos living in the Yukon-Kuskokwim Delta. That issue—the scope of activities to which statutory protections for hunting and fishing apply—was recently addressed by this Court in *Amoco Pro-*

duction Co. v. Village of Gambell, ___ U.S. ___, 107 S. Ct. 1396 (1987). As a party to that litigation, as well as an entity whose members are affected by interpretations of the statutory protections involved here, Nunam Kitlutsisti has a strong interest in ensuring that this Court's decision in *Gambell* is respected.

SUMMARY OF ARGUMENT

The court of appeals issued its opinion in this case on October 31, 1986. That decision found, *inter alia*, that Section 810 of the Conservation Act did not apply to the issuance of a permit allowing a private party to block the navigational servitude of the United States. The rationale for this conclusion was that the United States did not hold a written, recorded title to the servitude. Several months later, on March 24, 1987, this Court issued *Amoco Production Co. v. Village of Gambell*, ___ U.S. ___, 107 S. Ct. 1396 (1987). There, when addressing whether the United States held title to the mineral resources of the Outer Continental Shelf, this Court specifically rejected the argument that "title" should be construed as requiring a recorded deed. Finding that title should be given its ordinary meaning, this Court suggested that the United States holds title to all interests over which it asserts the right of control and disposition. Since this reasoning flatly rejects the rationale relied upon by the court of appeals, this Court should remand this matter in order to provide the court of appeals the opportunity to review its decision in light of *Gambell*.

ARGUMENT

I. THIS COURT'S *GAMBELL* DECISION INDICATES THAT A PERMIT ALLOWING A PRIVATE PARTY TO USE THE NAVIGATIONAL SERVITUDE TRIGGERS THE PROTECTIONS OF SECTION 810 OF THE CONSERVATION ACT.

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (Conservation Act) in an effort to preserve Alaska's natural and cultural resources. 16 U.S.C. §§ 3101 *et seq.* As a part of this undertaking, Congress passed Section 810 of the Conservation Act for the purpose of protecting subsistence uses of the "public lands" by Native Alaskans. As enacted, Section 810 requires federal agencies to evaluate the effect upon subsistence uses of these lands before permitting the use or other disposition of public lands. 16 U.S.C. § 3120. For the purpose of determining the scope of activities to which Section 810 applies, public lands are defined as "lands, waters, and interests therein . . . title to which is in the United States after the date of enactment of [ANILCA]." 16 U.S.C. § 3102.

In the decision below, the court of appeals refused to find Section 810 applicable to federal interests in Alaskan coastal waters. The claim advanced by the village of Angoon is straightforward. To economically log land on Admiralty Island, Shee Atika Corporation was required to secure from the Army Corps of Engineers a permit allowing it to build a breakwater on the navigational servitude held by the United States. Since Section 810 of the Conservation Act requires compliance in every instance when any federal agency issues a permit, the issuance of the breakwater permit—which the Corps now apparently concedes was

a major federal action significantly affecting the quality of the environment[1]—triggered the protections of Section 810.

The court of appeals rejected this claim on the ground that the permit did not allow Shee Atika to use an interest to which the United States held title. Holding that "[s]ince the United States does not hold title to the navigational servitude, the servitude is not 'public land' within the meaning of ANILCA," the court found that the issuance of the breakwater permit did not trigger the protections offered by that statute. *City of Angoon v. Hodel*, 803 F.2d 1016, 1027-28, n.6 (9th Cir. 1986). The decision thus permits the Corps to issue permits for the use of a servitude, owned by the United States, without complying with the requirements of Section 810.

The decision by the court of appeals conflicts with this Court's subsequent opinion in *Amoco Production Co. v. Village of Gambell*, ___ U.S. ___, 107 S. Ct. 1396 (1987). That case presented an issue not substantially different than the one involved here. There, the Department of the Interior argued that Section 810 did not apply to Outer Continental Shelf leasing because the United States does not hold title to the OCS or to its mineral resources. Although this Court found that Section 810 does not apply to the Outer Continental Shelf, it rejected the notion that "title" to an interest refers to a technical record or deed title. Adopting the plain and ordinary meaning of the word "title"—which is simply the right to control or dispose of an interest[2]—this Court specifically rejected

[1] This concession is implicit in the Corps' decision to prepare an environmental impact statement before issuing the permit.

[2] *E.g.*, BLACK'S LAW DICTIONARY.

the claim that the United States did not hold title to the mineral resources of the OCS. After noting that the plain language of the Conservation Act indicates that Section 810 applies to federal lands within the boundaries of Alaska, including coastal waters "to a line three miles from its coastline," 107 S. Ct. at 1405, this Court stated:

> The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States."

107 S. Ct. at 1406, n.15.

The conclusion that the term "title" is not limited to a technical record or deed title follows from the purpose of the definition of public lands. As this Court was aware, to ensure that State and Native land selections would not be invalidated by subsequent inclusion in federal conservation units, Section 102's definition of public lands distinguishes between those interests *specifically relinquished* to the State and to Native groups under the exercise of valid selection rights and those interests *still retained* by the United States after the enactment of the Conservation Act. H.R. Rep. No. 1045, Part I, 95th Cong., 2d. Sess. 80 (1978); 125 Cong. Rec. H49 (January 15, 1979) (statement of Cong. Udall). The phrase "title to which is in the United States" in Section 102 thus simply delineates retained from relinquished interests, in effect

recognizing the tautological proposition that the United States cannot hold title to interests it has previously conveyed away.

By failing to recognize that the term "title" simply connotes a right of control and disposition—rights which the United States unquestionably exercises over the navigational servitude—the decision below contravenes the language of the Conservation Act as well as this Court's *Gambell* decision interpreting that language. The navigational servitude is a paramount federal right to and power over navigable waters which is derived from the Property and Commerce Clauses, U.S. Const. art. I, § 8, cl. 3; U.S. Const. art IV, § 3, cl. 2. The source and nature of this federal interest was first articulated by the so-called Tidelands cases: *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); and *United States v. Texas*, 339 U.S. 707 (1950). There, in rejecting claims by coastal states that they held title to submerged lands within their territorial waters, this Court held that "paramount rights in and power over" the coastal zone vest in the federal government and that "acquisition" of the coastal zone is an incident of national sovereignty. *California*, 332 U.S. at 34, 38; *Louisiana*, 339 U.S. at 704; *Texas*, 339 U.S. at 719. Those cases indicate that the United States holds title to the coastal zone because *dominium* (property interests) in the coastal zone is so subordinate to *imperium* (rights of sovereignty) as to "coalesce and unite" in the United States. *E.g.*, *Texas*, 339 U.S. at 719. This conclusion was reached in the face of a forceful dissent by Justice Frankfurter who, accepting the majority's position that the states have no title in the coastal zone, argued that a decision

recognizing federal ownership of coastal waters should be made by Congress rather than by the courts. *California*, 332 U.S. at 45-46 (Frankfurter, J., dissenting).[3]

The Submerged Lands Act confirms the principle, made explicit by the Tidelands cases, that the navigational servitude is an interest in water to which the United States holds title. After the Tidelands cases had cast a cloud upon the presumed state title to lands beneath navigable waters,[4] Congress removed that cloud by enacting the Submerged Lands Act of 1953. 43 U.S.C. § 1301. To achieve this end, the Act conveys to the several states "title to and ownership of the lands beneath navigable waters." 43 U.S.C. § 1311(a). Additionally, and of greatest importance here, the Act expressly retains the United States' interests in the navigational servitude, together with all powers of regulation and control for the constitutional purposes of commerce, navigation, defense and international affairs. 43 U.S.C. at § 1314(a). *See also United States v. California*, 436 U.S. 32, 41 n.18 (1978). This reservation of the navigational servitude expressly declares the servitude to be paramount to, but not inclusive of, the states' rights of ownership and control

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[3] The navigational servitude extends to all navigable waters within the United States. Therefore, it follows from the rationale of the Tidelands cases that title to appurtenant inland waters vests in the United States as well. *See Submerged Lands: Hearings on S.J. Res. 13, S. 204, S. 107, and S.J. Res. 18 Before Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 235 (1953) (Statement of Sen. Daniel).

[4] *See, e.g., Submerged Lands: Hearings Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 256 (1953) (statement of Harry Brockel).

of those lands and resources conveyed by other sections of the Act. *Id.* As this Court has held, this reservation represents a valid exercise of Congress' constitutional right to dispose of property belonging to the United States "without limitation." *Alabama v. Texas*, 347 U.S. 272, 273 (1954).[5]

The proposition that the United States holds title to the navigational servitude—a tenet strongly supported by the Tidelands cases, the Submerged Lands Act, and the *Alabama v. Texas* decision—is confirmed by this Court's treatment of the navigational servitude for Fifth Amendment purposes. While the Fifth Amendment precludes takings without just compensation, this Court has found that the United States need not compensate property owners when exercise of the navigational servitude results in loss of riparian access,[6] loss of use of submerged lands,[7] or loss of structures obstructing navigation.[8] Trelease, *Federal State Relations in Water Law* (National Water Commission Legal Study No. 5) 178 (1971). Even in the context of otherwise compensable takings, this Court

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[5] The *Alabama* Court declared that the lands under navigable waters may be treated "precisely as an ordinary individual may deal with his farming property. [The United States] may sell or withhold them from sale." 347 U.S. at 273 (quoting *Camfield v. United States*, 167 U.S. 518, 524 (1897)).

[6] *See, e.g., United States v. Commodore Park*, 324 U.S. 386 (1945); *Gibson v. United States*, 166 U.S. 269 (1897).

[7] *See, e.g., United States v. Chicago, Minneapolis, St. Paul & Pac. R.R*, 312 U.S. 592 (1941); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913).

[8] *See, e.g., Louisville Bridge Co. v. United States*, 242 U.S. 409 (1917); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907).

has refused to grant compensation for losses of property value attributable to, or dependent upon, presence of the servitude. *United States v. Rands*, 389 U.S. 121 (1967); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). These holdings, in turn, have led to the rule that the servitude is a defect in the title to navigable waters, *see* Trelease, *supra* p. 8, at 175, as well as to the rule that Congress must enact special legislation extinguishing the servitude by declaring the appurtenant waters non-navigable. *E.g.*, 33 U.S.C. §§ 59(j),(q) (1982). *See* S. Rep. No. 1302, 92d Cong., 2d Sess. 2 (1972); 126 Cong. Rec. H28,381 (Sept. 30, 1980). *See also Bills to Promote the Exploration, Development, and Conservation of Certain Resources in the Submerged Lands and To Provide for the Use, Control, and Disposition of the Lands Beneath Inland Waters and In the Continental Shelf: Hearings on H.R. 2948 and Similar Bills Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 83d Cong., 1st Sess. at 229 (statement of John Lyle).

The rationale for this rule is plain: since the United States holds title to the navigational servitude, it need not pay compensation for using an interest which it already owns. Indeed, as the academic commentators have consistently pointed out, prior decisions issued by this Court make sense only if the United States owns the navigational servitude. Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 Or. L. Rev. 1, 2 (1968) ("the interest should be recognized for what it is and be dealt with in the context of the property clause of the Consti-

tution"); Munro, *The Navigation Servitude and the Severance Doctrine*, 6 Land & Water L. Rev. 491, 503 (1971) (the navigational servitude is "in effect ownership of the entire stream-flow"); Trelease, *supra* p. 8, at 176-81 (idea of servitude as property "offers an approach to the explanation of some cases").

As demonstrated by these commentators and by prior decisions of this Court, the navigational servitude is a property interest of the United States. Reserved to the United States by the Submerged Lands Act, the navigational servitude is an interest to which the United States holds title. Under the plain language of the Conservation Act and this Court's decision in *Gambell*, issuing a breakwater permit allowing Shee Atika to use the servitude triggered the protections for subsistence uses found in Section 810 of the Conservation Act. The court of appeals violated this principle when it allowed the Army Corps of Engineers to issue the breakwater permit without requiring compliance with Section 810 of the Conservation Act.

CONCLUSION

For the foregoing reasons, the Court should grant the writ, vacate the decision of the court of appeals, and remand for further proceedings consistent with this Court's decision in *Gambell*.

Respectfully submitted,

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